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Protracted conflicts in the GUAM area and their implications for international peace, security and development

The situation in the occupied territories of Azerbaijan

Responsibility of States for internationally wrongful acts

Letter dated 10 April 2017 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General

Upon instructions from my Government, I have the honour to submit to you a legal opinion on third party obligations with respect to illegal economic and other activities in the occupied territories of Azerbaijan (see annex).*

The opinion was prepared at the request of the Government of the Republic of Azerbaijan by the eminent international lawyer, Allain Pellet, who is also a professor emeritus at Université Paris Ouest Nanterre La Défense and a former member (1990-2011) and Chair (1997) of the International Law Commission.

As is known, international law in general and its relevant norms and principles in particular, together with the decisions and documents adopted by the international organizations within this framework, including, in the first place, Security Council resolutions 822 (1993), 853 (1993), 874 (1993) and 884 (1993), constitute the basis for the settlement of the conflict in and around the Nagorno-Karabakh region of the Republic of Azerbaijan and the removal of its consequences.

Against the background of the uninterrupted attempts of Armenia to cover up its unlawful actions and depart from its commitments and obligations by means of misinterpretation of the international legal norms and principles and the aforementioned Security Council resolutions, Azerbaijan has consistently promoted the critical importance of upholding international law and of its faithful application with a view to achieving a long-awaited breakthrough in resolving the conflict and ending the occupation of the territories of Azerbaijan and the suffering of the peoples affected by the Armenian aggression.

Over the years since the beginning of the conflict, Azerbaijan has actively encouraged discussions on the legal aspects of the conflict, including within the

* The annex is being circulated in the language of submission only, without formal editing.

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United Nations, and has brought to the attention of the international community numerous legal reports. In particular, the Republic of Azerbaijan submitted to the Secretary-General the reports on the legal consequences of the armed aggression of the Republic of Armenia against the Republic of Azerbaijan (A/63/662-S/2008/812), prepared by Yoram Dinstein, on the fundamental norm of the territorial integrity of States and the right to self-determination in the light of Armenia's revisionist claims (A/63/664-S/2008/823), on the international legal responsibilities of Armenia as the belligerent occupier of Azerbaijani territory (A/63/692-S/2009/51) and on the international legal rights of the Azerbaijani internally displaced persons and the Republic of Armenia's responsibility (A/66/787-S/2012/289), all three of which were prepared by Malcolm N. Shaw.

Furthermore, the Republic of Azerbaijan submitted to the Secretary-General a comprehensive report of the Ministry of Foreign Affairs on illegal economic and other activities in the occupied territories of Azerbaijan (A/70/1016-S/2016/711), which demonstrated, through facts, figures and statistical data, that Armenia's policy and practices in the occupied territories of Azerbaijan were in breach of international law, undermined the prospects of achieving a political settlement of the conflict and posed an imminent threat to peace, security and stability in the region. The report also recalled the responsibility of the international community to ensure the strict compliance by Armenia with its international obligations.

The legal opinion on third party obligations with respect to illegal economic and other activities in the occupied territories of Azerbaijan provides an authoritative neutral view, which contributes to a better understanding of the existing legal commitments and requirements for addressing the resolution of the conflict and related issues and offers concrete measures that might be taken in that regard.

According to the main findings of the legal opinion, Armenia and its affiliates in the occupied territories of Azerbaijan are responsible for internationally wrongful acts, several of which constitute serious breaches of obligations arising from peremptory norms of general international law (*jus cogens*).

These include, most notably: (a) the use of force in order to impose the de facto secession of the Nagorno-Karabakh region and the other districts of Azerbaijan occupied by Armenia in violation of the Charter of the United Nations; (b) the ensuing violation of the sovereignty and territorial integrity of Azerbaijan; (c) the ethnic cleansing of the occupied territories of Azerbaijan, including the establishment of settlements and the transfer of populations resulting in the change of the demographic composition of those territories; (d) the gross violations of the law of belligerent occupation, in particular of article 43 of the Regulations respecting the Laws and Customs of War on Land of 1907 and article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949; (e) the exploitation of the natural resources of the occupied territories without consideration for the primacy of the interests of the population (as it existed before the ethnic cleansing of the region); and (f) the alteration of the cultural heritage of the region.

The legal opinion makes it clear that the aforementioned serious breaches call for the application of the special consequences resulting from aggravated responsibility, namely: (a) the non-recognition of the situation created by such breaches; (b) the prohibition of aid or assistance in maintaining that situation; and (c) the exclusion of any immunities for the authors of these breaches. Another consequence of this aggravated responsibility is that all States are required to invoke the responsibility of Armenia and to take measures against it, including by means of sanctions, as well as criminal prosecutions and civil proceedings.

I should be grateful if you would have the present letter and its annex circulated as a document of the General Assembly, under agenda items 32, 37 and 74, and of the Security Council.

(*Signed*) Yashar **Aliyev**
Ambassador
Permanent Representative

Annex to the letter dated 10 April 2017 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General

LEGAL OPINION ON THIRD PARTY OBLIGATIONS WITH RESPECT TO ILLEGAL ECONOMIC AND OTHER ACTIVITIES IN THE OCCUPIED TERRITORIES OF AZERBAIJAN

1. The present Report was prepared on the request of the Government of the Republic of Azerbaijan.[1] It provides a legal opinion on third party obligations with respect to illegal economic and other activities in the occupied territories of Azerbaijan and offer concrete measures that might be taken in that regard. The Report is framed around the following questions and provides comprehensive answers to them:

1) Legal consequences of the involvement, directly or indirectly/by action or inaction, of third States, as well as natural and legal persons within their jurisdiction in the following economic and other activities in the occupied territories of Azerbaijan, arising from general international law, international humanitarian law, the European Union legislation, the European Convention on Human Rights and other applicable legal norms:

- Establishment of settlements/encouraging transfer of Armenian population into the occupied territories;
- Looting, exploitation of and trade in assets, natural resources and other forms of wealth in the occupied territories;
- Exploitation of water and agricultural resources;
- Providing products, investments, technology, heavy machinery and services facilitating economic activities;
- Establishing enterprises, creating joint ventures or conducting any other business in or with entities in the occupied territories;
- Providing assistance, sponsoring or providing financial, material or technological support for, or goods or services in support of, any economic activity in the occupied territories;
- Import and selling of any goods, including settlement produce, services or technology originating in the occupied territories or which underwent last substantial transformation there;
- Exportation, re-exportation, sale, or supply, directly or indirectly, from States or by their natural and legal persons, wherever located, of any goods, services, or technology to the occupied territories or to Armenia and its natural and legal persons, which is transferred to and used in the occupied territories;
- Provision, directly or indirectly, of banking services, including financing or financial assistance, as well as insurance and reinsurance related to the imports and exports of goods and services to/from the occupied territories;
- Making funds, financial loans, credits and other economic resources, directly or indirectly, available for the benefit of the natural or legal persons operating in the occupied territories or available for any investment activity there by natural and legal persons or by any other foreign entity, international organization and financial institution;
- Permanent economic, social and transport infrastructure changes;
- Exploitation of Azerbaijan's fixed and cellular radio-telecommunication networks and radio frequencies in the occupied territories;
- Cutting of rare species of trees, timber exporting and other damage to the environment;
- Archaeological excavations, embezzlement of artefacts, altering of cultural character of the occupied territories;
- Promoting the occupied territories as 'tourist destination' and encouraging/organizing illegal visits to/from these territories;
- Other activities.

[1] The current text is the short version of the Report. Only the arguments and conclusions presented in the original version of the Report submitted on 5 May 2016 are in full accordance with the author's position formulated on the basis of the information available to him.

2) Obligations of States regarding the activities listed above in their territories, including measures that might be taken to ensure the compliance with those obligations.

3) Measures that might be taken to institute legal proceedings against natural and legal persons in the States of their jurisdiction for involving in and profiteering from illegal activities in the occupied territories of Azerbaijan.

4) Measures which should be taken by States concerning the entry in their territories of the leaders and other agents of the separatist regime established by Armenia in the occupied territories of Azerbaijan.

2. The present Report will answer each of these four questions after having first discussed the general legal context.

I. GENERAL LEGAL CONTEXT

3. The four questions I am asked to answer concern the region of Daghlyg Qarabagh or Nagorno-Karabakh ("Nagorny Karabakh" in Russian,[2] meaning "mountainous" Karabakh) and other surrounding districts referred to by Azerbaijan and in various circles of the international community as "occupied territory" and called by Armenia the "Nagorno-Karabakh Republic" (hereinafter "NKR"). All four questions largely depend on the analysis of the legal situation prevailing in this region. It is therefore appropriate to precisely define the situation from the perspective of international law and its consequences generally speaking before coming to the individual questions.

A. Summary of the Historical Background

4. Armenia and Azerbaijan were both part of the former Union of Soviet Socialist Republics as the Soviet Socialist Republic of Armenia and the Soviet Socialist Republic of Azerbaijan. They became independent respectively on 21 September 1991 and on 18 October 1991.[3]

5. Taken over by the Bolsheviks in 1920 together with the rest of Azerbaijan, Nagorno-Karabakh was established within the Azerbaijan SSR on 7 July 1923 as an autonomous oblast.

6. Nevertheless, the Armenian SSR has always shown interest in Nagorno-Karabakh,[4] which was populated by a majority of ethnic Armenians[5] as a result of the artificial drawing of the limits of the oblast by the Soviets. However, this was not the case on the other parts of Azerbaijan's territories now occupied by Armenia: with the exception of some towns in the occupied territories, ethnic Armenians were not in majority: as pointed out by the International Crisis Group, basing itself on the 1989 census of the population of the USSR, before the war, the inhabitants of the occupied districts "were almost exclusively Azeris".[6] After 1987 armed clashes opposed citizens of both countries and Azerbaijanis were the subject of attacks both in the territory of the Armenian SSR and in the autonomous region of Nagorno-Karabakh.[7] And soon before the independence, on 1st December 1989, the Armenian Parliament adopted a resolution on the unification of Armenia and Nagorno-Karabakh.[8]

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[2] Except when I quote, I refer to the region of Daghlyq Qarabagh as Nagorno-Karabakh in the following developments.

[3] Azerbaijan declared independence from the Soviet Union on 30 August 1991. This was subsequently formalised by means of the adoption of the Constitutional Act on the State Independence of 18 October 1991 then confirmed by a nationwide referendum on 29 December 1991.

[4] See H.Krüger, *The Nagorno-Karabakh Conflict: A Legal Analysis*, Springer, Berlin, Heidelberg, 2010, pp. 17-18.

[5] As noted by the European Court of Human Rights (ECHR): "According to the USSR census of 1989, the NKAO had a population of 189,000, consisting of 77% ethnic Armenians and 22% ethnic Azeris, with Russian and Kurdish minorities" (ECHR, Grand Chamber, Judgment, 16 June 2015, *Chiragov and Others v. Armenia*, Application no. 13216/05, para. 13).

[6] International Crisis Group, "Nagorno-Karabakh: Viewing the Conflict from the Ground", *Crisis Group Europe*, Report N° 166, 14 September 2005, p. 7.
(http://www.crisisgroup.org/~/media/Files/europe/166_nagorno_karabakh_viewing_the_ conflict_from_the_ground.pdf).

[7] See A/67/875-S/2013/313, *Annex to the letter dated 23 May 2013 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary General, Non-compliance by the Republic of Armenia with Security Council Resolutions 822(1993), 853(1993, 874(1993) and 884(1993)*, 24 May 2013, para. 1. See also S.E.Cornell, *The Nagorno-Karabakh Conflict*, Department of East European Studies, Uppsala University, Report no. 46, 1999, pp. 13-15.
(http://expert-translations.ro/uploads/Nagorno%20Karabah.pdf).

[8] H.Krüger, prec. note 4, pp. 20-21. See also S.E.Cornell, *ibid.*, pp. 23-24.

7. After the declarations of independence of Armenia and Azerbaijan, there was an intensification of the Armenian offensives, highlighted by the fall of the Azerbaijani city of Khojaly.[9] That Armenia's action turned the situation into an international armed conflict because two independent States were involved from this point on. Other Azerbaijani cities have been occupied after the fall of Khojaly, such as Shusha, Lachin and Kelbajar.[10] Neutral sources have described massacres of Azerbaijani civilians and disarmed soldiers by Armenian forces – particularly after the fall of the cities of Khojaly and Kelbajar.[11] In the words of the European Court of Human Rights:

> "On 2 September the Soviet of the NKAO announced the establishment of the Nagorno-Karabakh Republic (hereinafter the 'NKR'), consisting of the territory of the NKAO and the Shaumyan district of Azerbaijan, and declared that it was no longer under Azerbaijani jurisdiction. On 26 November the Azerbaijani parliament abolished the autonomy previously enjoyed by Nagorno-Karabakh. In a referendum organised in Nagorno-Karabakh on 10 December, 99.9% of those participating voted in favour of secession. However, the Azeri population boycotted the referendum. In the same month, the Soviet Union was dissolved and Soviet troops began to withdraw from the region. Military control of Nagorno-Karabakh was rapidly passing to the Karabakh Armenians. On 6 January 1992 the 'NKR', having regard to the results of the referendum, reaffirmed its independence from Azerbaijan.
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> 18. In early 1992 the conflict gradually escalated into full-scale war. The ethnic Armenians conquered several Azeri villages, leading to at least several hundred deaths and the departure of the population."[12]

8. In 1993, the United Nations Security Council adopted a series of four resolutions on that matter. In the first resolution of 30 April, Resolution 822 (1993), the Security Council demanded "the immediate cessation of all hostilities and hostile acts with a view to establishing a durable cease-fire, as well as immediate withdrawal of all occupying forces from the Kelbajar district and other recently occupied areas of Azerbaijan".[13]

9. In its second resolution on that matter, Resolution 853 (1993) of 29 July 1993, the Security Council condemned the seizure of new districts and areas in Azerbaijan and "attacks on civilians and bombardments of inhabited areas"[14]. It further called on "the parties concerned to reach and maintain durable cease-fire arrangements".[15]

10. These resolutions were reiterated a few months later,[16] but despite the Security Council's position, the attacks kept going and other Azerbaijani cities were occupied. This was immediately noted by the Chairman of the Minsk Conference of the Conference on Security and Cooperation in Europe on Nagorno-Karabakh who stated that this was "in flat contradiction with past Nagorny Karabakh Armenian assurances that they remained committed to a peaceful settlement of the conflict".[17]

11. In a Report dated 14 April 1993, the Secretary-General of the United Nations stated that the use of "heavy weaponry" seemed "to indicate the involvement of more than local ethnic forces" despite the fact that the

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[9] A brief factual account of the fall of Khojaly can be found in a Judgment of the European Court of Human Rights (ECHR): "It appears that the reports available from independent sources indicate that at the time of the capture of Khojaly on the night of 25 to 26 February 1992 hundreds of civilians of Azerbaijani ethnic origin were reportedly killed, wounded or taken hostage, during their attempt to flee the captured town, by Armenian fighters attacking the town, who were reportedly assisted by the 366th Motorised Rifle Regiment" (ECHR, Judgment, 22 April 2010, *Fatullayev v. Azerbaijan*, Application no. 40984/07, para. 87).

[10] See e.g.: Human Rights Watch, Reports, *Bloodshed in the Caucasus: Escalation of the Armed Conflict in Nagorno-Karabakh*, Human Rights Watch, 1992, fn 8 and p. 7.

[11] See e.g.: Human Rights Watch, Reports, *ibid*., 84 p. and *Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh*, New York: Human Rights Watch, 1995, p. 195 or Thomas De Waal, *Black Garden: Armenia and Azerbaijan through Peace and War*, NYU Press, 2004, p. 337.

[12] ECHR, *Chiragov and Others v. Armenia*, prec. note 5.

[13] S/RES/822(1993), *Armenia-Azerbaijan*, 30 April 1993, para. 1.

[14] S/RES/853(1993), *Armenia-Azerbaijan*, 29 July 1993, para. 2.

[15] *Ibid*., para. 3.

[16] See S/RES/874(1993), *Armenia-Azerbaijan*, 14 October 1993.

[17] S/26184, *Annex to the Letter dated 28 July 1993 from the Permanent Representative of Italy to the United Nations Addressed to the President of the Security Council, Report by the Chairman of the Minsk Conference of the Conference on Security and Cooperation in Europe on Nagorny Karabakh to the President of the Security Council dated 27 July 1993*, 28 July 1993, para. 12.

observations of the United Nations Representatives in the area "have not made it possible to confirm this involvement".[18]

12. Finally, the Security Council, in its last resolution on that matter, Resolution 884 (1993) of 12 November 1993, called upon "the Government of Armenia to use its influence to achieve compliance by the Armenians of the Nagorny Karabakh region of the Azerbaijani Republic" with its previous resolutions.[19]

13. A ceasefire was then signed on 9 May 1994 (the Bishkek Protocol) and took effect on 12 May 1994. At that time, the Armenian occupation already concerned 20% percent of Azerbaijan's territory.[20]

14. The situation did not evolve since then and that portion of the Azerbaijani territory is still occupied. Furthermore, the ceasefire was followed by sporadic episodes of violence that led the Security Council's President to reiterate the Council's concerns "at recent violent incidents", and to reaffirm all the Council's "relevant resolutions, *inter alia*, on the principles of sovereignty and territorial integrity of all States in the region",[21] more than a year after the signature of the ceasefire agreement.[22]

15. Attempts for mediation have been made, mostly through the OSCE Minsk Process:

> "29. Several proposals for a peaceful solution of the conflict have failed. Negotiations have been carried out under the auspices of the OSCE (Organization for Security and Co-operation in Europe) and its so-called Minsk Group. In Madrid in November 2007 the Group's three Co-Chairs – France, Russia and the United States – presented to Armenia and Azerbaijan a set of Basic Principles for a settlement [which have since been updated]. Following intensive shuttle diplomacy by Minsk Group diplomats and a number of meetings between the presidents of the two countries in 2009, the process lost momentum in 2010. So far the parties to the conflict have not signed a formal agreement on the Basic Principles."[23]

B. Legal Characterization of the Situation

16. Resulting from an unlawful use of force (2.), the "secession" of Nagorno-Karabakh cannot be justified on the basis of the right of peoples to self-determination (1.). As a result, the situation prevailing in Nagorno-Karabakh is that of a belligerent occupation by Armenia (3).

1. The Relevance and Scope of the Right of Peoples to Self-Determination

17. Both Armenia and the self-proclaimed "NKR" have insistently put forward the principle of the right of peoples to self-determination in order to justify the proclamation of the "NKR".[24]

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[18] S/25600, *Report of the Secretary-General Pursuant to the Statement of the President of the Security Council in Connection with the Situation Relating to Nagorny-Karabakh*, 14 April 1993, para. 10.

[19] S/RES/884(1993), *Armenia-Azerbaijan*, 12 November 1993, para. 2.

[20] According to L. Bechner, "Armenian forces had [already] occupied nearly 20 percent of the Azerbaijani territory surrounding Nagorno-Karabakh" ("Nagorno-Karabakh: The Crisis in the Caucasus", *Council For Foreign Relations*, 2005 (http://www.cfr.org/armenia/nagorno-karabakh-crisis-caucasus/p9148); this is not accurate: this percentage includes Nagorno-Karabakh *and* the seven surrounding districts occupied by Armenia.

[21] S/PRST/1995/21, *Statement by the President of the Security Council*, 26 April 1995.

[22] To my knowledge, official declarations in relation with the recent military incidents have been limited to deploring casualties and deaths and calling to stop the fights and avoid escalation (see e.g.: Statement by the High Representative of the European Union for Foreign Affairs and Security Policy/Vice-President of the European Commission Federica Mogherini, 2 April 2016, available at: http://eeas.europa.eu/statements-eeas/2016/160402_03_en.htm; Statement by the Secretary-General of the United Nations Ban Ki-moon, 2 April 2016, available at: http://www.un.org/apps/news/story.asp?NewsID=53601#.VytcUYSLIIU; Press Release by the Co-Chairs of the OSCE Minsk Group, 2 April 2016, available at: http://www.osce.org/mg/231216; Statement by the NATO Secretary General, 5 April 2016, available at: http://www.nato.int/cps/en/natohq/news_129719.htm).

[23] ECHR, Grand Chamber, Judgment, 16 June 2015, *Sargsyan v. Azerbaijan*, Application no. 40167/06, para. 26.

[24] See e.g.: CCPR/C/92/Add.2, *Initial Report of the Republic of Armenia to the Human Rights Committee*, 14 July 1997, paras. 30-33; A/67/924-S/2013/396, *Letter dated 1 July 2013 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General*, 5 July 2013, p. 1.

18. It would be beyond the scope of the present Report to determine whether the population of Nagorno-Karabakh can be considered as a "people" within the meaning of the word in the framework of the principle of the right of peoples to self-determination – an issue all the more difficult that two preliminary questions should be answered: (i) Should one speak of "the people of Nagorno-Karabakh" as a whole or of "the Armenian people of Nagorno-Karabakh"? and (ii) at what time must this assessment be made: that of the so-called "secession" or today? I will simply assume that there exists a "people of Nagorno-Karabakh" not trying to further define it and with the understanding that this is a most controversial issue. But this is indeed not the end of the question since it remains to answer another question: admitting this population constitutes a people, what is – or would be – the consequence of its existence?

19. According to the Republic of Armenia, the right of peoples to self-determination justifies the secession.[25] Even if one considers that the Armenian population of the former autonomous oblast of Nagorno-Karabakh, this is not so. Such reasoning mixes two different issues: the right to self-determination on the one hand and the right to secession on the other hand. The short answer is as follows: all peoples have a right to self-determination; it can result in a right to get independence; but this is not the case in the present situation. I will examine very briefly these three propositions.

20. As proclaimed in Article 1(2) of the Charter of the United Nations, one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".[26] This right is reaffirmed in the Declaration on the granting of independence to colonial countries and peoples of the General Assembly in which it was expressly stated that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[27] And, in another important resolution, the General Assembly considered that:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter".[28]

Finally, the first common article to the 1966 International Covenants provides that:

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

21. The references to self-determination in the case law have been summarized by the International Court of Justice in its Advisory Opinion concerning the *Wall*:

> "The Court would recall that in 1971 it emphasized that current development in 'international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-

[25] CCPR/C/92/Add.2, *Initial Report of the Republic of Armenia to the Human Rights Committee*, *ibid*., paras. 30-33.

[26] See also Article 55 mentioning the "conditions of stability which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

[27] A/RES/1514(XV), *Declaration on the granting of independence to colonial countries and peoples*, 17 October 1960, para. 2. It can be sustained that, since, by any means, the "people of Nagorno-Karabakh" – if it exists and whatever its definition – cannot be considered as a colonial people, resolution 1514 (XV) does not apply. According to the present writer, this position overlooks the mention of "all peoples" in this founding text.

[28] A/RES/2625(XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, 24 October 1970, Principle V.

determination applicable to all [such territories]'. The Court went on to state that 'These developments leave little doubt that the ultimate objective of the sacred trust 'referred to in Article 22, paragraph 1, of the Covenant of the League of Nations 'was self-determination... of the peoples concerned' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971* p. 31, paras. 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.* ; see also *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995*, p. 102, para. 29)."[29]

22. The right to self-determination applies to all peoples, *but* it includes the right to independence only in specific situations and entities. Resolutions 1514 (XV) and 2625 (XXV) of the General Assembly expressly mention peoples subject "to alien subjugation, domination and exploitation"[30]. In all other cases, as explained by the Supreme Court of Canada, this right "is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state".[31]

23. Armenia alleged that the Armenians of Nagorno-Karabakh exercised their right to self-determination[32] of which they had been deprived by Azerbaijan since, on 26 November 1991, the Azerbaijani Parliament had abolished the autonomy previously enjoyed by Nagorno-Karabakh.[33] The argument is misconceived in that it ignores the chronology and eventually backfires on its author: it shows that up to the armed conflict Nagorno-Karabakh and its inhabitants enjoyed a status of autonomy, which seems, without much doubt,[34] largely correspond to the generally admitted standard of self-determination. Therefore, the deprivation of autonomy – which had no concrete consequence in view of the loss of control of the territory of Nagorno-Karabakh by the Azerbaijani Government –[35] is the consequence of the armed conflict, not its cause. There is no question, in the present case of the Armenians of Nagorno-Karabakh being "totally frustrated" from exercising its right to self-determination internally to use the characterization made by the Supreme Court of Canada to describe what it considers as being a possible third ground justifying a right to unilateral secession, besides that granted to colonial or occupied peoples.[36]

24. Furthermore, I note that the 1996 OSCE Lisbon Summit recalled the "three principles which should form part of the settlement of the Nagorno-Karabakh conflict" recommended by the Co-Chairmen of the Minsk Group and supported by all member States of the Minsk Group:

"They are:

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[29] ICJ, Advisory Opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports* 2004, p. 172, para. 88.

[30] See A/RES/1514(XV), *Declaration on the granting of independence to colonial countries and peoples*, 17 October 1960 and A/RES/2625(XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, 24 October 1970.

[31] Supreme Court of Canada, 20 August 1998, *Reference re Secession of Quebec*, Case no. 25506, Report 51998°2 SCR 217, para. 126.

[32] See CCPR/C/92/Add.2, *Initial Report of the Republic of Armenia to the Human Rights Committee*, prec. note 24, paras. 30-33; *Letter dated 1 July 2013 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General*, prec. note 24, p. 1.

[33] Resolution No. 279-XII adopted on 23 November 1991 and signed by the President on 26 November 1991; see Thomas De Waal, *Black Garden: Armenia and Azerbaijan through Peace and War*, prec. note 11, p. 162. As for the status of Nagorno-Karabakh during the Soviet period, see the Decree creating the autonomous oblast of Nagorno-Karabakh adopted on 7 July 1923 by the Central Executive Committee of the Azerbaijan SSR, Collection of Statutes and Decrees of the Labor and Peasant Government of the USSR in the year of 1923. Baku, 1925, pp. 384-385. For a description of this status, see A/64/475-S/2009/508, *Annex to the Letter dated 30 September 2009 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, The armed aggression of the Republic of Armenia against the Republic of Azerbaijan: root causes and consequences*, 6 October 2009, paras. 74-77.

[34] Here again, I cannot, in the framework of this paper, discuss these historical facts from a legal perspective in any details.

[35] See above, para. 7.

[36] *Reference re Secession of Quebec*, prec. note 31, para. 135. The Court notes that "[a] number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance" (at para. 134), but it does not expressly accept the proposition.

- territorial integrity of the Republic of Armenia and the Azerbaijan Republic;
- legal status of Nagorno-Karabakh defined in an agreement based on self-determination which confers on Nagorno-Karabakh the highest degree of self-rule within Azerbaijan;

- guaranteed security for Nagorno-Karabakh and its whole population, including mutual obligations to ensure compliance by all the Parties with the provisions of the settlement."

This statement – the only one within the OSCE which identified the scope of the application of the principle of self-determination in this particular situation – confirms that the population of Nagorno-Karabakh can be conferred "the highest degree of self-rule within Azerbaijan" but is not entitled to independence.

2. A Situation Resulting from an Unlawful Use of Force

25. It does not result from the above that, even absent any circumstance justifying a right to secession, secession is forbidden by international law. It is not. And when an entity succeeds in meeting the conditions for statehood during a certain period of time it could certainly be considered as a State within the perspective of international law. As recalled by the Arbitration Commission for Yugoslavia (Badinter Commission), "the existence or disappearance of the State is a question of fact."[37] And, in this regard, the recognition – or non-recognition – by third States is not conclusive[38] although the fact that the "NKR" has been recognized by *no* other State (including Armenia) is quite revealing. It shows that the international community of States is conscious that the proclamation of independence of this entity was unlawful.

26. As noted by the International Court of Justice in its Advisory Opinion on *Kosovo*, "no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council", but such declarations are not lawful when "connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *(jus cogens)*."[39] This is so *par excellence* of the norm prohibiting the "use of force against the territorial integrity or political independence of any State".[40]

27. In the present case, the *de facto* secession of the "NKR" encounters two series of decisive (interrelated) objections:

- it results from an unlawful use of force (a); and
- it infringes the fundamental principle of territorial integrity of States (b).

(a) Armenia's Unlawful Use of Force

28. There seems to be little doubt that the situation prevailing in Nagorno-Karabakh is the result of the use of military force by Armenia. In spite of Armenia's weak and unpersuasive denials,[41] this military involvement was in fact acknowledged by the highest Armenian authorities[42] and is attested from numerous various independent sources.

29. In a very detailed and well-documented report dated December 1994, Human Rights Watch gathered evidence establishing "the involvement of the Armenian army as part of its assigned duties in the conflict"[43] and made the conclusion that "[a]s a matter of law, Armenian army troop involvement in Azerbaijan makes Armenia a party to the conflict and makes the war an international armed conflict".[44]

[37] Conference on Yugoslavia, Arbitration Commission, Opinion No. 1, 29 November 1991, *International Law Reports*, vol. 92, pp. 164-165, para. 1 (a); see also: Opinion No. 8, *International Law Reports*, vol. 92, p. 201, para. 2.
[38] "[T]he recognition of a State by other States has only declarative value" (First Opinion, *ibid.*, para. 2). See also 20 August 1998, *Reference re Secession of Quebec*, prec. note 31, para. 142.
[39] ICJ, Advisory Opinion, 22 July 2010, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, ICJ Reports* 2010, pp. 437-438, para. 81.
[40] Charter of the United Nations, Article 2(4).
[41] See e.g. ECHR, *Chiragov and Others v. Armenia*, prec. note 5, paras. 159-161.
[42] See *ibid.*, paras. 62, 66 or 68; see also paras. 72 and recapitulating paras. 178-179.
[43] Human Rights Watch/Helsinki, *Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh*, prec. note 11, p. 113.
[44] *Ibid.*, p. 127.

30. This has also been the position of several Human Rights bodies.[45] Thus, in April 2001, the United Nations Committee on the Elimination of Racial Discrimination stated that after its independence, Azerbaijan "was soon engaged in war with Armenia"[46]. Years later, the United Nations Committee on Economic, Social and Cultural Rights also referred to the "conflict with Armenia".[47]

31. It cannot be denied that given the involvement of the Armenian military forces in the conflict, the situation is an international armed conflict.

32. I note that, while the armed intervention of Armenia in the process leading to the *de facto* secession of the "NKR" is averred and was decisive for establishing and consolidating this situation, the Security Council abstained from calling it an "aggression". This (non-)position, clearly dictated by political considerations,[48] does not imply that Armenian actions do not amount to an aggression.

33. The definition of aggression given in General Assembly Resolution 3314 (XXIX) of 14 December 1974 (and taken up in Article 8bis inserted in the Statute of the International Criminal Court by the Kampala Conference in 2010)[49] reads as follows:

> "Article 1
>
> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.
>
> *Explanatory note*: In this Definition the term 'State':
>
> (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
> (b) Includes the concept of 'group of States' where appropriate.
>
> Article 2
>
> The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."

Article 3 of the Definition provides with examples that "are not exhaustive".[50] However, it includes:

> "(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.

[45] For a more detailed review, see A/63/692-S/2009/51, *Annex to the Letter dated 23 January 2009 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, Report on the international legal responsibilities of Armenia as the belligerent occupier of Azerbaijani territory*, 27 January 2009, paras. 19-21.

[46] See CERD/C/304/Add.75, *Concluding observations of the Committee on the Elimination of Racial Discrimination*, 12 April 2001, para. 3.

[47] See E/C.12/1/Add.104, *Concluding observations of the Committee on Economic, Social and Cultural Rights*, 14 December 2004, para. 11.

[48] Generally speaking, the Security Council avoids to clearly qualify a use of force as an armed attack (see e.g.: J.A.Frowein and N.Krisch, "Article 39" in B.Simma *et alii* (eds), Oxford UP, 2nd ed. 2002, p. 722, para. 13; P.d'Argent, J.Daspremont, F.Dopagne et R.van Steenberghe, "Article 39" in J.-P.Cot and A.Pellet (eds.), *La Charte des Nations Unies: Commentaire article par article*, 3rd ed., Economica, Paris, 2005, pp. 1149-1150; or P.Daillier, M.Forteau and A.Pellet, *Droit international public*, 8th ed., L.G.D.J., 2009, pp. 1099-1100.

[49] See RC/RES.6 Adopted by the Review Conference, *The Crime of aggression, Annex I, Amendments to the Rome Statute of the International Criminal Court on the Crime of aggression*, 11 June 2010, para. 2.

[50] A/RES/3314(XXIX), 14 December 1974, *Definition of Aggression*, Article 4.

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.
[...]

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

34. Although the present paper can only remain at a high level of generality, my *prima facie* opinion is that the whole action of Armenia in the establishment of the "NKR" amounts to an aggression. And indeed some of the particular actions perpetrated by Armenian troops or with their complicity qualify as acts of aggression. This is in particular the case of the events which have led to the fall and destruction of Khojaly in 1992, which can reasonably be considered, along with the "[d]irect artillery bombardment of the Azerbaijani town of Lachin – mounted from within the territory of the Republic of Armenia" as falling under Article 3 (a) of the Definition,[51] notwithstanding the fact that it might have been accompanied by acts amounting to genocide.[52]

35. This being said, even if the Armenian use of force during the events preceding the secession of the "NKR" were not recognized as being an armed attack or constituting acts of aggression, they still would be unlawful and incompatible with the prohibition of the use of armed force in international relations in contradiction with the Charter of the United Nations and its purposes.[53] Thus, in its 1986 Judgment in the case of the *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice underlined that, "[a]longside certain descriptions which may refer to aggression," the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)), referred to above[54]

"includes others which refer only to less grave forms of the use of force. In particular, according to this resolution:

'Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

States have a duty to refrain from acts of reprisal involving the use of force.
Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force'.

192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found:

[51] See A/63/662-S/2008/812, *Annex to the Letter dated 22 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General*, 24 December 2008, paras. 16-18.

[52] I note that accusations of genocide are made by both sides. However there can be no doubt that the result of the Nagorno-Karabakh war is that the region was cleaned from its Azerbaijani population, which before the war constituted around 25% of its population of the region (See *Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh*, prec. note 11, p. xx; H.Krüger, *The Nagorno-Karabakh Conflict: A Legal Analysis*, prec. note 4, p. 17). The same is also true and even more flagrant concerning the occupied surrounding territories in which the inhabitants were almost exclusively Azerbaijanis and are now composed of an important majority of ethnic Armenians (International Crisis Group, "Nagorno-Karabakh: Viewing the Conflict from the Ground", prec. note 6, p. 7).

[53] It would indeed be incongruous for Armenia to invoke the right of self-defence provided for by Article 51 of the Charter.

[54] See paras. 21 *et seq.* above.

> 'Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State'."[55]

36. Similarly, the Security Council condemned "the invasion of the Kelbajar district of the Republic of Azerbaijan",[56] "the seizure of the district of Agdam in the Azerbaijani Republic",[57] and "the occupation of the Zangelan district and the city of Goradiz in the Azerbaijani Republic"[58] and "bombardments of the territory of the Azerbaijani Republic".[59] This cannot leave the slightest doubt on the fact that those acts were, at the very least, uses of armed force incompatible with the Charter of the United Nations. And, it seems more than probable that Armenia sent abundant disguised forces on the territory of Azerbaijan to carry acts of armed force. For instance, the International Crisis Group noted that: "many conscripts and contracted soldiers from Armenia continue to serve in NK" and that "[f]ormer conscripts from Yerevan and other towns in Armenia have told Crisis Group they were seemingly arbitrarily sent to Nagorno-Karabakh and the occupied districts immediately after presenting themselves to the recruitment bureau. They deny that they ever volunteered to go to Nagorno-Karabakh or the adjacent occupied territory."[60]

37. The prohibition of the use of force contrary to the Charter of the United Nations – and not only that of aggression – is a peremptory rule of international law, recognized as such by the international community of States as a whole.[61] It is listed among the norms of *ius cogens* in the lists established by the International Law Commission of the United Nations (ILC) whether during its works on the Law of treaties[62] or on the Responsibility of States for internationally wrongful acts.[63] ;

(b) Violation of Azerbaijani's sovereignty and territorial integrity

38. "[T]he same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force",[64] that is in respect to the result of the use of force by Armenia (and its support to the secessionists inside Azerbaijan): the *de facto* secession of Nagorno-Karabakh constitutes an obvious violation of the sovereignty and territorial integrity of Azerbaijan and, consequently, of Article 2(4) of the UN Charter.[65]

39. As explained by Arbitrator Max Huber in a celebrated *dictum* in its Award in the *Island of Palmas case*:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations."[66]

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[55] ICJ, Judgment, 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua*, *ICJ Reports* 1986, pp. 101-102, paras 191-192.

[56] S/RES/822(1993), prec. note 13, para. 3.

[57] S/RES/853(1993), prec. note 14, preamble, para. 5.

[58] S/RES/884(1993), prec. note 19, preamble, para. 5.

[59] *Ibid.*, para. 2.

[60] International Crisis Group, "Nagorno-Karabakh: Viewing the Conflict from the Ground", prec. note 6, p. 9.

[61] See Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969.

[62] The first example of a treaty violating a norm of *ius cogens* given in the commentary to draft article 50 which became Article 53 of the 1969 Vienna Convention, is "a treaty contemplating an unlawful use of force contrary to the principles of the Charter" (*ILC Yearbook* 1966, vol. II, p. 248, para. (3) of the commentary).

[63] Article 19 of the ILC first draft (1996) mentioned "among the "international crimes" of the States "a serious breach of an international obligation of an essential importance for the maintenance of international peace and security, such as that prohibiting aggression" (*ILC Yearbook*, 1966, vol. II, part 2, p. 75).

[64] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, prec. note 29, p. 171, para. 87.

[65] See above para. 25.

[66] P.C.A., Award of the Tribunal, 4 April 1928, *Island of Palmas case (Netherlands, USA)*, Report of International Arbitral Awards, Volume II, p. 838.

40. The control by Armenia through the Puppet State[67] it has established on approximately twenty per cent of the territory of Azerbaijan is clearly in breach of this basic norm of contemporary international law. Territory is an indispensable element for the existence of a State and is consubstantial to the concept of sovereignty. The rule imposing the respect of territorial integrity embodied in Article 2, paragraph 4, of the Charter of the United Nations is recalled in a variety of universal and regional instruments[68] and has been reaffirmed in a series of well-known judicial or arbitral decisions.[69]

41. Whatever its legal characterization, the *de facto* secession of the "NKR" with the decisive military support of Armenia violates Azerbaijan's sovereignty and territorial integrity. And indeed, the right to self-determination of the Armenians of Nagorno-Karabakh could not constitute a justification or a circumstance precluding wrongfulness of such a breach. As shown above, the right to self-determination does not imply a right to unilateral secession as far as the territory of sovereign independent States is concerned, but also, it must be conciliated with an equally legally binding principle, that of territorial integrity.

42. As recalled by the second Opinion of the Arbitration Commission for Yugoslavia, "it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise".[70] And the Supreme Court of Canada also stressed that:

> "The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states."[71]

43. This is the case of Resolution 1514 (XV), paragraph 6 of which provides that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country[72] is incompatible with the purposes and principles of the Charter of the United Nations" while paragraph 7 call upon all States to "observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity." Similarly, the 1975 Declaration on Friendly Relations reaffirms the principle of equal rights and self-determination of peoples and stresses that such rights are not to

> "be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction."

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[67] On the meaning of that expression, see below, para. 74.

[68] See e.g.: Helsinki Final Act of 1 August 1975, Principles I-IV, *I.L.M.* 1975 (n° 14), p. 1292 (available at: http://www.osce.org/mc/39501?download=true); A/RES/37/10, *Manila Declaration on the Peaceful Settlement of International Disputes*, 15 November 1982, point 4; Convention on the Law of the Sea, 10 December 1982, Article 301; A/RES/41/128, *Declaration on the Right to Development*, 4 December 1986, para. 3; European Charter for Regional or Minority Languages of 5 November 1992, Article 5.

[69] See e.g.: P.C.A., *Island of Palmas case*, prec. note 66, p. 838; ICJ, Judgment, 15 June 1962, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, ICJ Reports* 1962, p. 34; or ICJ, Judgment, 19 December 1978, *Aegean Sea Continental Shelf, ICJ Reports* 1978, p. 36, para. 85; ICJ, *Military and Paramilitary Activities in and against Nicaragua*, prec. note 55, p. 99, para. 188; ICJ, Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports* 2005, p. 223, para. 148.

[70] Conference on Yugoslavia, Arbitration Commission, Opinion No. 2, 11 January 1992, *International Law Reports*, vol. 92, p. 168, para. 2.

[71] Supreme Court of Canada, prec. note 31, para. 127.

[72] The word "country" targets independent States as colonies or other non-self-governing territories, but the latter have, "under the Charter, a status separate and distinct from the territory of the State administering it" (A/RES/25/2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970, Principle V) with the consequence that accession to independence of such territories does infringe the principle of territorial integrity of the Administering Powers.

And it adds: "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."[73] And, just to take another example, the Final Act of the Conference on Security and Co-operation in Europe of 1975 (Helsinki Final Act), states:

> "The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States."[74]

44. As a matter of principle, except in exceptional circumstances[75] – not realized in the present case –,[76] "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.[77]

3. A Belligerent Occupation and/or a "Puppet State"?

45. The situation prevailing on the ground might seem difficult to define from a legal point of view: in spite of domestic pressures, Armenia has taken great care not to formally annex the territory of Nagorno-Karabakh and the surrounding areas, nor has it recognized the so-called "NKR". These abstentions, by themselves are telling: in spite of the historical evidence it invokes, Armenia seems to be conscious that the situation resulting from its acts is legally dubious. And it certainly is. Although I consider that it is better characterized as being a belligerent occupation laying obligations on Armenia, the "NKR" could also be defined as a Puppet State in a sense that it was established by Armenia in the occupied territories and is under pervasive political, military, economic and other support, direction and control from Armenia. In any case, such a characterization would not exonerate Armenia from its responsibility.

(a) A Belligerent Occupation

46. As shown above,[78] since the independence of both States in 1991, there can be no doubt about the involvement of Armenia in the conflict making it an international armed conflict. As a result, the law of war (*ius in bello*) applies, including the rules applicable to belligerent occupation.

(i) Involvement of Armenia in the Armed Conflict and its Aftermath

47. The question of belligerent occupation as a matter of international law is dealt with in a few instruments of international humanitarian law and has often been the subject of jurisdictional decisions.

48. Explaining the consequences resulting from the prohibition of the "use of force against the territorial integrity or political independence of any State" in Article 2(4) of the Charter, the General Assembly of the United Nations stressed in its 1975 Declaration on Friendly Relations that:

> "The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter."[79]

49. Now, in spite of this general prohibition, belligerent occupation is a question of fact – defined by the law. Its traditional definition – which reflects customary law –[80] is given in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907:

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[73] *Ibid.*

[74] Helsinki Final Act, prec. note 68.

[75] Although I consider that a full denial by force can justify self-determination in the form of unilateral secession, I admit that this is controversial, and is only supported by undecisive practice.

[76] See above, para. 22.

[77] Supreme Court of Canada, 20 August 1998, *Reference re Secession of Quebec*, prec. note 31, para. 122.

[78] See paras. 6, 28, 29 and 30.

[79] A/RES/25/2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970, Principle IV. See also the Helsinki Final Act, prec. note 68, Principle IV.

[80] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, prec. note 29, p. 172, para. 89; or ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, prec. note 69, p. 229, para. 172.

> "Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation extends only to the territory where such authority has been established and can be exercised."

50. For its part, common Article 2, paragraph 2, of the 1949 Geneva Conventions (ICRC Conventions), to which both Azerbaijan and Armenia are parties,[81] provides that they apply "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

51. These general prohibitions having been recalled, the question is whether Armenia can be considered as the occupying power of a part of the Azerbaijani territory. In order to make such a determination, guidelines can be found in the case-law of the International Court of Justice. In particular, in *DRC v. Uganda*, the Court stated:

> "In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an 'occupying Power' in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question."[82]

And, in the *Wall* Advisory Opinion the International Court of Justice noted:

> "that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties."[83]

52. I have shown above – inasmuch as the format of this Opinion allows – that Armenian armed forces played a decisive role in the actions that led to the secession *de facto*[84] and this can leave no doubt on the international character of the conflict. Moreover, both Azerbaijan and Armenia are Parties to the 1949 Fourth Geneva Convention.[85] However, it must also be examined "whether there is sufficient evidence to demonstrate that the [occupying] authority [is] in fact established and exercised by the intervening State in the areas in question."[86] To that end, I can only refer to authoritative findings made by neutral observers.

53. This includes the Security Council which

- demanded the "immediate withdrawal of all occupying forces from [the…] occupied areas in Azerbaijan";[87]
- condemned "the seizure of the district of Agdam and of all other recently occupied areas of the Azerbaijan Republic" and reiterated its demand for "the immediate, complete and unconditional withdrawal of the occupying forces involved" from these areas;[88]
- called again for "the withdrawal of forces from recently occupied territories…";[89] and
- "noted with alarm" and condemned the occupation of new areas in the Azerbaijani Republic and demanded again "the unilateral withdrawal of occupying forces from" these areas and "the withdrawal of occupying forces from other recently occupied areas of the Azerbaijani Republic in accordance with the 'Adjusted timetable of urgent steps to implement Security Council resolutions 822 (1993) and 853 (1993)' (S/26522, appendix) as amended by the CSCE Minsk Group meeting in Vienna of 2 to 8 November 1993."[90]

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[81] For the Fourth Geneva Convention, which is the most relevant for this Report, see: https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380.

[82] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, prec. note 69, p. 230, para. 172.

[83] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, prec. note 29, pp. 174-175, para. 95.

[84] See above paras. 34 *et seq.*

[85] See note 81 above.

[86] See note 82 above.

[87] S/RES/822 (1993), prec. note 13, para. 1.

[88] S/RES/853 (1993), prec. note 14, paras. 1 and 3.

[89] S/RES/874 (1993), prec. note 16, para. 5.

[90] S/RES/884 (1993), prec. note 19, para. 5, and para. 4.

Although Armenia is not expressly mentioned as the occupying power, it is clear that it is targeted by these calls and demands: it could not have been requested from Azerbaijan to withdraw from its own territory.

54. As rightly noted in 2004 by the Rapporteur of the Parliamentary Assembly of the Council of Europe on "The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference", these calls "applied in particular to Armenia. Regrettably, major parts of these Resolutions have not yet been implemented."[91] The involvement of Armenian forces has not stopped with the cease-fire reached on 12 May 1994. The role of Armenia in the occupation was confirmed in a General Assembly Resolution of 2008 demanding "the immediate, complete and unconditional withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan".[92] The Parliamentary Assembly of the Council of Europe adopted a similar position: in its Resolution 1416 of 25 January 2005 it noted that "[c]onsiderable parts of the territory of Azerbaijan are still occupied by Armenian forces, and separatist forces are still in control of the Nagorno-Karabakh region";[93] it also reiterated "that the occupation of foreign territory by a member state constitutes a grave violation of that state's obligations as a member of the Council of Europe".[94] And in its Resolution of 20 May 2010 on the need for an EU strategy for the South Caucasus the European Parliament "demands (…) the withdrawal of Armenian forces from all occupied territories of Azerbaijan."[95] And even more strongly, in April 2012 the European Parliament recalled that "the occupation of territories belonging to a third country is a violation of international law and is contrary to the founding principles of the European Neighbourhood Policy, thereby jeopardising the whole Eastern Partnership project"[96] and noted that "deeply concerning reports exist of illegal activities exercised by Armenian troops on the occupied Azerbaijani territories, namely regular military manoeuvres, renewal of military hardware and personnel and the deepening of defensive echelons."[97]. In this same resolution the European Parliament recommended that negotiations on the EU-Armenia Association Agreements be linked to commitments regarding "the withdrawal of Armenian forces from occupied territories surrounding Nagorno-Karabakh and their return to Azerbaijani control" and called "on Armenia to stop sending regular army conscripts to serve in Nagorno-Karabakh."[98]

55. As noted by the European Court of Human Rights,

> "[t]he annual report of the International Institute for Strategic Studies (IISS), 'The Military Balance', for the years 2002, 2003 and 2004 assessed that, of the 18,000 troops in Nagorno-Karabakh, 8,000 were personnel from Armenia. The 2013 report by the same institute expressed, *inter alia*, that 'since 1994, Armenia has controlled most of Nagorno-Karabakh, and also seven adjacent regions of Azerbaijan, often called the 'occupied territories'' ('The Military Balance' 2002, p. 66; 2003, p. 66; 2004, p. 82; and 2013, p. 218)."[99]

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[91] Explanatory memorandum by the Rapporteur (Mr. D.Atkinson), Doc. 10364, 29 November 2004, para. 19 (available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10733&lang=en).

[92] A/RES/62/243, *The situation in the occupied territories of Azerbaijan*, 14 March 2008, para. 2 – to be noted however: the resolution was passed by a vote of 39 to 7, with 100 abstentions. See also General Assembly consensus resolution A/RES/60/285, with the same title, 7 September 2006.

[93] Para. 1.

[94] *Ibid.*, para. 2; see also para. 1. On November 4, 2015, the Political Affairs Committee Parliamentary Assembly of the Council of Europe (PACE) adopted a draft resolution proposing that the Assembly call for "the withdrawal of Armenian armed forces and other irregular armed forces from Nagorno-Karabakh and the other occupied territories of Azerbaijan, and the establishment of full sovereignty of Azerbaijan in these territories." This proposal was not adopted by the Parliamentary Assembly in January 2016 (see http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5993&lang=2&cat=8), in contrast to resolution 2086 (2016) of 26 January 2016, entitled "Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water", in which the Parliamentary Assembly of the Council of Europe called for "the immediate withdrawal of Armenian armed forces from the region concerned" (see http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5992&lang=2&cat=8).

[95] Resolution 2009/2216(INI), para. 8.

[96] The Eastern Partnership is an initiative involving the EU, its member States and 6 Eastern European States (Armenia, Azerbaijan, Georgia, the Republic of Moldova and Ukraine, based on a commitment to international law principles and fundamental values such as democracy and human rights).

[97] European Parliament resolution of 18 April 2012 containing the European Parliament's recommendations to the Council, the Commission and the European External Action Service on the negotiations of the EU-Armenia Association Agreement, preamble paras. G and H.

[98] *Ibid.*, paras. 1(b) and (r).

[99] ECHR, *Chiragov and Others v. Armenia*, prec. note 5, para. 63.

56. In 2005, in a Report on the Nagorno-Karabakh conflict, the International Crisis Group considered that there was a "high degree of integration" between the forces of Armenia and Nagorno-Karabakh.[100]

57. Earlier that year, the Parliamentary Assembly of the Council of Europe, recalling the Security Council's resolutions of 1993, stated that "[c]onsiderable parts of the territory of Azerbaijan are still occupied by Armenian forces" and considered that "the occupation of a foreign territory by a member State constitutes a grave violation of that State's obligations as a member of the Council of Europe".[101]

58. It results from the elements above that Armenia can be defined as the occupying power of the occupied territories of Azerbaijan.

(ii) Summary of Armenia's Obligations as Belligerent Occupant

59. As the occupying power, Armenia is due to respect strict obligations under international law. Provisions dealing with occupation are to be found in the Regulations concerning the Laws and Customs of War on Land, annexed to The Hague Convention IV respecting the Laws and Customs of War on Land of 18 October 1907, which are considered as reflecting customary international law,[102] and in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, to which both Armenia and Azerbaijan are parties.[103]

60. There is no need here to detail the obligations of the occupying power – this will be done as necessary in the Second Part of this Opinion – but it is in order to mention the belligerent occupant's general obligations since they apply to the whole range of activities carried out by Armenia in Nagorno-Karabakh and has consequences in respect to the relations between this area and third parties.

61. One of the paramount applicable rules is expressed in Article 43 of the 1907 Hague Regulations. It reads as follows:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

62. The International Court of Justice interpreted this provision as comprising "the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party".[104]

63. For its part, Article 49 of the 1949 Fourth Geneva Convention provides that:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
>
> The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in

[100] International Crisis Group, "Nagorno-Karabakh: Viewing the Conflict from the Ground", prec. note 6, p. 10.

[101] See Resolution 1416(2005), Parliamentary Assembly, *The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference*, 25 January 2005.

[102] See: ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, prec. note 29, p. 172, para. 89.

[103] See above note 81.

[104] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, prec. note 69, p. 231, para. 178.

satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
The Protecting Power[105] shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

64. Besides these general (binding) guidelines, the Fourth Geneva Convention contains a number of specific rules concerning e.g. the protection of workers (Art. 52), of private property (Art. 53), of public health (Art. 56), penal legislation and procedure (Arts. 64 to 78).

65. Moreover, as the International Court of Justice stressed in several occasions, occupation does not absolve the occupying power from respecting international rules protecting human rights in the occupied territory even if some limitations may result from the state of war.

66. In its 2005 Judgment in *DRC v. Uganda*, the Court, recalling its Advisory Opinion on the *Wall* of the previous year, stated:

> "216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.' (*ICJ Reports 2004*, p. 178, para. 106.) It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories (*ibid.*, pp. 178-181, paras. 107-113)."[106]

This clearly reflects the actual state of the law.

67. I stress again that, occupation being a pure question of fact,[107] the rules cursorily introduced above apply whether the initial use of force resulting in the military occupation was lawful or not. Thus :

> "At the outset, we desire to point out that International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject."[108]

(b) A "Puppet State" or a de facto *annexation?*

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[105] Given Armenia's denying that it occupies Nagorno-Karabakh, no Protecting Power has been designated – however, more generally, the institution might be considered as having become obsolete.

[106] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, prec. note 69, pp. 242-243, para. 216. See also e.g.: ICJ, Advisory Opinion, 8 July 1996, *Legality of the Threat of Use of Nuclear Weapons*, *ICJ Reports* 1996, p. 240, para. 25.

[107] See above, para. 50.

[108] US Military Tribunal, Nuremberg, 8 July 1947 to 19 February 1948, *The Hostage Trial*, *Law Reports of Trials of War Criminals*, Vol. VIII, Case no. 47, p. 59.

68. While there are strong reasons to consider that Armenia is a belligerent occupier, other possible designations can be envisaged. Thus, the Parliamentary Assembly of the Council of Europe considers that the Nagorno-Karabakh region has been annexed *de facto* by Armenia:

> "2. The Assembly expresses its concern that the military action, and the widespread ethnic hostilities which preceded it, led to large-scale ethnic expulsion and the creation of mono-ethnic areas which resemble the terrible concept of ethnic cleansing. The Assembly reaffirms that independence and secession of a regional territory from a state may only be achieved through a lawful and peaceful process based on the democratic support of the inhabitants of such territory and not in the wake of an armed conflict leading to ethnic expulsion and the *de facto* annexation of such territory to another state. The Assembly reiterates that the occupation of foreign territory by a member state constitutes a grave violation of that state's obligations as a member of the Council of Europe and reaffirms the right of displaced persons from the area of conflict to return to their homes safely and with dignity."[109]

69. This also confirms that (belligerent) occupation is not exclusive from other characterizations, and the applicable legal rules complement without excluding one another. However, while "belligerent occupation" describes a factual situation, "*de facto* annexation" highlights the wrongful character of that same situation.

70. The wrongfulness of the annexation of parts of the territory of another State is a consequence of the first principle identified in Declaration 2625 (XXV) of the United Nations General Assembly according to which "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations:"

> "The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal."

71. This is the most probable reason why Armenia has not formally recognized the "NKR" as a State.

72. Indeed, there are good reasons to consider that the "NKR" is not a "State" within the real meaning of the word. It is unanimously accepted that "the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty."[110] And there can be but very little doubt that this last character is missing in the present case.

73. The present Opinion is not a proper place to discuss in detail the definition of sovereignty, which has given way to endless discussions between lawyers. Suffice it to note that the "NKR" lacks at least two attributes usually linked with sovereignty: effectivity and "immediacy". As for the effectivity, the facts justifying the categorisation of the situation as a belligerent occupation speaks for themselves.

74. Immediacy is different. As noted by the International Court of Justice, States are "political entities" that are "direct subjects of international law."[111] Concerning the "NKR", this condition is not met. The question is not that it is not recognised by other States since the "recognition of a State by other States has only declarative value."[112], although the fact that the "NKR" was not recognised by *any* State is indeed telling. But what matters is the ensuing result of this unanimous non-recognition: as far as I understand, this entity has no contact with other states or international organisations except through the channel of Armenia; it does not conclude international treaties nor is it represented in any way in international organisations. The only notable reason for doubt in this regard is that the Security Council has included "the Armenians of the Nagorny Karabakh region of the Azerbaijani Republic" among the

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[109] Resolution 1416(2005), Parliamentary Assembly, *The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference*, 25 January 2005, para. 2.

[110] Yugoslavia Arbitration Commission, Opinion N° 1, prec. note 37, para. 1(b); see also Montevideo Convention on Rights and Duties of States of 26 December 1933, article 1.

[111] ICJ, Advisory Opinion, 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, *ICJ Reports* 1949, p. 178.

[112] Yugoslavia Arbitration Commission, Opinion N° 8, prec. note 37, para. 2.

"parties concerned" by the conflict.[113] However, this designation precisely shows that the Council rejects the idea that the "NKR" qualifies as a State. The same holds true when considering the various appellations given by the European Court of Human Rights to so-called "NKR": "separatist regime"[114] or "subordinate local administration".[115]

75. Although the notion of "Puppet State" has never been fully theorised and can cover a variety of situations, they all have in common that, as authoritatively explained by Professor Krystyna Marek, "[a] puppet State is not a State at all according to international law".[116] Moreover, it is admitted that the responsibility for their actions must be imputed to the State which pulls the strings – [117] in the present case, Armenia.

76. There can be no doubt that the "NKR" can be said to be such an entity. In this respect, it compares with a great number of precedents, such as Manchukuo, Transkei and other South-African "bantustans are" (like Transkei or Venda). In all those cases, the Security Council and the General Assembly of the United Nations have adopted resolutions condemning – more or less vigorously – the situation thus created for the entity claiming statehood.[118]

77. The European Court of Human Rights case-law is replete with judgments dealing with the question.[119]

78. It must be noted that the International Court of Justice for its part refused, in its 2007 Judgment on the first *Genocide* case (*Bosnia and Herzegovina v. Serbia*) to accept that the Republika Srpska was under the *de facto* control of Serbia.[120]

79. However, in the present case, I have no hesitation to consider that Armenia, by contrast with what was the case for Serbia over the Republika Srpska, exercises a *de facto* control on the "NKR" or, to borrow the European Court of Human Rights' terminology,[121] that the latter is under the extraterritorial control of the former. This was expressly decided by the Grand Chamber of the Strasbourg Court in its Judgment of 16 June 2015 in the case concerning *Chiragov and Others v. Armenia*, following an impeccable reasoning, which I find helpful to quote at some length.

80. In that case, the Government of Armenia had argued that "the 'NKR' was a sovereign, independent state possessing all the characteristics of an independent state under international law. It exercised control and jurisdiction over Nagorno-Karabakh and the territories surrounding it."[122] These views were strongly and convincingly dismissed by the Court which first set out the "General principles on extra-territorial jurisdiction":

> "168. The Court has recognised the exceptional circumstances capable of giving rise to the exercise of extra-territorial jurisdiction by a Contracting State when the State, through the effective control of the relevant territory and its inhabitants abroad, as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. The principles have

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[113] See S/RES/853 (1993), prec. note 14, para. 9 and S/RES/884 (1993), prec. note 19, para. 2.

[114] See e.g. ECHR, *Sargsyan v. Azerbaijan*, prec. note 23, paras. 130 and 333.

[115] ECHR, *Chiragov and Others v. Armenia*, prec. note 5, para. 106.

[116] K. Marek, *Identity and Continuity of States in Public International Law*, Librairie Droz, Geneva, 1968, p. 113. Marek (who also refers to P. Guggenheim, *Lehrbuch des Völkerrechts, Band I. Unter Berücksichtigung der internationalen und schweizerischen Praxis*, Unbekannter Einband, 1948, p. 170) also argues that the very creation of such an entity is illegal (*ibid.*, p. 120).

[117] See: *ibid.*, pp. 189-190 or J. Crawford, *The Creation of States in International Law*, Oxford UP, 2nd ed. 2007, pp. 78-83.

[118] Just to give some examples see e.g.: A/RES/31/6 A, *Policies of apartheid of the Government of South Africa. The so-called Independent Transkei and Other Bantustans*, 26 October 1976; S/RES/541 (1993), 18 November 1993; S/RES/550 (1984), 11 May 1984. See also: Assembly of the League of Nations, Resolution adopted on March 11 1932, Miscellaneous No. 5 (1932), No. 10, p. 13.

[119] ECHR, Judgment, 18 December 1996, *Loizidou v. Turkey*, Application no. 15318/89, para. 44. ECHR, Grand Chamber, Judgment, 8 July 2004, *Ilaşcu and Others v. Moldova and Russia*, Application no. 48787/99, para. 330.

[120] See ICJ, Judgment, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *ICJ Reports 2007*, pp. 166-167, para. 394.

[121] Which reflects that of Article 1 of the European Convention on Human Rights: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[122] ECHR, *Chiragov and Others v. Armenia*, prec. note 5, para. 163.

been set out in several cases, including *Ilaşcu and Others*[123]. The relevant passages of [*Catan and Others*] are cited here:

> '103. The Court has established a number of clear principles in its case-law under Article 1. Thus, as provided by this Article, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'.[124] 'Jurisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.[125]
>
> 104. A State's jurisdictional competence under Article 1 is primarily territorial.[126] Jurisdiction is presumed to be exercised normally throughout the State's territory.[127] Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases[128].
>
> 105. To date, the Court has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts[129].
>
> 106. One exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration[130]. Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.[131]
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> 107. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the

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[123] ECHR, *Ilaşcu and Others v. Moldova and Russia*, prec. note 119, paras. 311-319. See also several other judgments also cited by the Court in this passage: ECHR, Grand Chamber, Judgment, 7 July 2011, *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, paras. 130-139; and ECHR, Grand Chamber, Judgment, 19 October 2012, *Catan and Others v. Moldova and Russia*, Applications nos. 43370/04, 8252/05 and 18454/06, paras. 130-139.

[124] See ECHR, *Soering v. the United Kingdom*, 7 July 1989, para. 86, Series A no. 161; *Bankovic and Others v. Belgium* [GC] (dec.), no. 52207/99, para. 66, ECHR 2001-XII.

[125] See ECHR, *Ilaşcu and Others v. Moldova and Russia*, prec. note 119, para. 311, ECHR 2004-VII; *Al-Skeini and Others v. the United Kingdom*, prec. note 123, para. 130, 7 July 2011.

[126] See ECHR, *Soering v. the United Kingdom*, prec. note 124, para 86; *Bankovic and Others v. Belgium*, prec. note 124, paras 61 and 67; *Ilaşcu and Others v. Moldova and Russia*, prec. note 119, para. 312; *Al-Skeini and Others v. the United Kingdom*, *ibid.*, para. 131.

[127] ECHR, *Ilaşcu and Others v. Moldova and Russia*, *ibid.*; *Assanidze v. Georgia* [GC], Application no. 71503/01, para. 139, ECHR 2004-II.

[128] ECHR, *Bankovic and Others v. Belgium*, prec. note 124, para. 67; *Al-Skeini and Others v. the United Kingdom*, prec. note 123, para. 131.

[129] ECHR, *Al-Skeini and Others v. the United Kingdom*, *ibid.*, para. 132.

[130] ECHR, *Loizidou v. Turkey (preliminary objections)*, 23 March 1995, para. 62, Series A no. 310; *Cyprus v. Turkey* [GC], Application no. 25781/94, para. 76, ECHR 2001-IV; *Bankovic and Others v. Belgium*, prec. note 124, para. 70; *Ilaşcu and Others v. Moldova and Russia*, prec. note 119, paras. 314-316; *Loizidou (merits)*, prec. note 119, para. 52; *Al-Skeini and Others v. the United Kingdom*, prec. note 123, para. 138.

[131] ECHR, *Cyprus v. Turkey*, prec. note 130, paras. 76-77; *Al-Skeini and Others v. the United Kingdom*, *ibid.*, para. 138.

> strength of the State's military presence in the area[132]. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.[133]
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> ...
>
> 115. ... As the summary of the Court's case-law set out above demonstrates, the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law.'
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> 169. The Court first considers that the situation pertaining in Nagorno-Karabakh and the surrounding territories is not one of Armenian State agents exercising authority and control over individuals abroad, as alternatively argued by the applicants. Instead, the issue to be determined on the facts of the case is whether the Republic of Armenia exercised and continues to exercise effective control over the mentioned territories and as a result may be held responsible for the alleged violations. As noted by the Court in *Catan and Others*[134], this assessment will primarily depend on military involvement, but other indicators, such as economic and political support, may also be of relevance."[135]

81. Based on this reasoning, the European Court of Human Rights then examines the relevant facts. Among the most salient, the following ones can be noted:

- "in the Court's view, it is hardly conceivable that Nagorno-Karabakh – an entity with a population of less than 150,000 ethnic Armenians – was able, without the substantial military support of Armenia, to set up a defence force in early 1992 that, against the country of Azerbaijan with approximately seven million people, not only established control of the former NKAO but also, before the end of 1993, conquered the whole or major parts of seven surrounding Azerbaijani districts.";[136]

- "82. The Armenian Government have claimed that the 'NKR' has its own legislation and its own independent political and judicial bodies. However, its political dependence on Armenia is evident not only from the mentioned interchange of prominent politicians, but also from the fact that its residents acquire Armenian passports for travel abroad as the 'NKR' is not recognised by any State or international organisation ...";[137]

- "the financial support given to the 'NKR' from or via Armenia is substantial."[138]

To these elements some others could be added. Thus, as pointed out by the Permanent Representative of Azerbaijan to the United Nations, "the movement of personnel in leadership echelons between the supposedly separate entities has happened on the highest possible level", and "the present *de jure* top organs of Armenia were its *de facto* organs even while hoisting the banner of the so-called 'Nagorno-Karabakh Republic'".[139] In particular, as has been noted, "[t]he extent of the semi-union between Karabakh and Armenia was highlighted in March 1997 when Ter-Petrossian appointed Robert Kocharian, Karabakh's president, to be Armenia's new prime minister. Despite his

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[132] See ECHR, *Loizidou v. Turkey (merits)*, prec. note 119, paras. 16 and 56; *Ilaşcu and Others v. Moldova and Russia*, prec. note 119, para. 387.

[133] See ECHR, *Ilaşcu and Others v. Moldova and Russia*, *ibid.*, paras. 388-394; *Al-Skeini and Others v. the United Kingdom*, cited above note 123, para. 139.

[134] ECHR, *Catan and Others v. Moldova and Russia*, prec. note 123, para. 107.

[135] ECHR, *Chiragov and Others v. Armenia*, prec. note 5, para. 169.

[136] *Ibid.*, para. 174.

[137] *Ibid.*, para. 182.

[138] *Ibid.*, para. 183.

[139] A/70/875-S/2013/313, *Annex to the Letter dated 23 May 2013 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, Non-compliance of the Republic of Armenia with Security Council resolutions 822(1993), 853(1993), 874(1993) and 884(1993)*, 24 May 2013, para. 27. See also A/67/753-S/2013/106, *Annex to the Letter dated 21 February 2013 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, The Crime in Khojaly: perpetrators, qualification and responsibility under international law*, 22 February 2013, para. 35. This is confirmed by ECHR, *Chiragov and Others v. Armenia*, prec. note 5, paras. 78 and 181.

appointment, Kocharian retained his Karabakh "citizenship" and returned to the republic in September to vote in elections for his successor."[140]

82. All these factors reinforce the conclusion of the European Court of Human Rights which considered:

> "186. All of the above reveals that the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the 'NKR', that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the 'NKR' and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin."[141]

83. In the light of the information available to me, I fully concur with this conclusion, of which consequences must be drawn concerning the responsibility incurred by Armenia both for its own acts in relation with the belligerent occupation of Nagorno-Karabakh and the neighbouring parts of Azerbaijan and for the acts of the "NKR".

C. Armenia's Responsibility for Its Internationally Wrongful Acts

84. A careful distinction must be made between two possible grounds for Armenia's responsibility. On the one hand, the very fact of occupation does not, by itself, entail Armenia's responsibility, but it is responsible for the breaches of the law of occupation, including the rules protecting human rights maintained in force in such a situation. On the other hand, there is no doubt that by having promoted, encouraged, assisted in the creation and the maintenance of the secessionist region of Nagorno-Karabakh, both by using its own military force and by aiding and assisting the Armenian secessionist forces in the region, Armenia has entailed and is still entailing its international responsibility. Moreover and as a consequence, Armenia is, in principle, responsible for the internationally wrongful acts committed by the "NKR", an entity which it controls – including those amounting to serious breaches of obligations resulting from peremptory norms.

(a) The system of international responsibility

85. In all these aspects of the case discussed, the applicable law is that of the law of State responsibility as it is codified in the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ILC Articles").[142] The basic principle exposed in Article 1 is that "[e]very internationally wrongful act of a State entails the international responsibility of that State."; and Article 2 describes as follows the "Elements of an internationally wrongful act of a State":

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State."

86. Chapter V concludes Part I of the Articles (on "The internationally wrongful act of a State") by describing the "Circumstances precluding wrongfulness" and Part II draws the consequences of the internationally wrongful act of a State which are the followings:

> "Article 29 *Continued duty of performance*
>
> The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

[140] E.Walker, "No Peace, No War in the Caucasus: Secessionist Conflicts in Chechnya, Abkhazia and Nagorno-Karabakh", *Belfer Center for Science and International Affairs, Occasional Paper*, February 1998 (http://belfercenter.ksg.harvard.edu/files/no_peace_no_war_csia_occasional_paper_1998.pdf).

[141] ECHR, *Chiragov and Others v. Armenia*, prec. note 5, para. 186.

[142] ILC Articles on Responsibility of States for internationally wrongful acts, annexed to A/RES/56/83 of 12 December 2001 (for the text of the Draft articles with commentaries, see A/56/10, General Assembly Official Records, Fifty-sixth Session, Supplement No. 10, *Report of the International Law Commission, Fifty-third Session* (23 April-1 June and 2 July-10 August 2001), pp. 59-365)

Article 30 *Cessation and non-repetition*
The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;
(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31 *Reparation*

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

The more precise rules concerning "Reparation for injury" are detailed in Articles 34 to 39.

87. All these rules apply to all categories of violations which are attributable[143] to Armenia. However, some of these breaches go for aggravated reactions. In effect, the occupation of certain Azerbaijani territories and the related acts might constitute a case of serious breaches of obligations arising under peremptory norms of general international law.

(b) An aggravated responsibility

(i) The notion of serious breach of an obligation arising under a peremptory norm of general international law

88. The ILC Articles, in addition to the "classic" consequences of an internationally wrongful act contained in the first chapter of Part I, deals with an aggravated form of responsibility in the third Chapter of the same Part.[144] This chapter purports "to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State Responsibility".[145]

89. The first article of the Chapter, Article 40, deals with the scope of application of this specific form of responsibility and reads as follow:

"1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation".

90. It results from the commentary that said obligations "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[146]

91. The commentary provides with examples of such norms:

"(5) Although not specifically listed in the Commission's commentary to article 53 of the Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.[147] The peremptory character of this prohibition

[143] On this issue, see below, paras. 108-114.
[144] ILC Articles, Chapter III, *Serious breaches of under peremptory norms of general international law*.
[145] *Ibid.*, commentary, para. (7).
[146] *Ibid.*, Article 40, *Application of this chapter*, commentary, para. (3).
[147] Fn 682 in the original: "*United Nations, Treaty Series*, vol. 1465, p. 112."

has been confirmed by decisions of international and national bodies.[148] In the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflict as 'intransgressible' in character, it would also seem justified to treat these as peremptory.[149]"[150]

92. The Commission considers that this also applies "to the prohibition against torture" and that the examples it provided "may not be exhaustive".[151]

93. Paragraph 2 of Article 40 requires the violation of such a norm to be serious, that is to say in the Commission's words, "a gross or systematic failure by the responsible State to fulfil the obligation". To be considered as systematic, "a violation would have to be carried out in an organized and deliberate way", whereas a gross violation "denotes violations of flagrant nature".[152]

(ii) Armenia's "serious breaches"

94. In view of the above, the situation of the Azerbaijani occupied territories can be argued to fall, at least for part of it, under the scope of Article 40 of the ILC Articles. In effect, the Armenian aggression and the following occupation of Nagorno-Karabakh and other regions obviously constitute such a breach. The prohibition of aggression being part of the peremptory norms and the violation appearing as serious, since it is flagrant, organized and deliberated, this can reasonably be seen as falling under the scope of Article 40. Furthermore, some specific acts such as the attacks on Khojaly and Kelbajar[153] also constitute serious breaches of obligations arising under peremptory norms of general international law.

95. As far as genocide is concerned the situation is in some respect "symmetrical". While it is difficult to assert with certainty that genocidal acts have been committed,[154] I consider that it would be difficult to deny that, at the global level, a "successful" ethnic cleansing has been committed in all the Azerbaijani territories now controlled by Armenia. There does not exist any generally accepted legal definition of "ethnic cleansing", but authoritative doctrinal definition has been proposed and the expression has been used in numerous resolutions of the General Assembly and the Security Council of the United Nations and in the framework of other international organisations.

96. In the first resolution of the Security Council mentioning ethnic cleansing, Resolution 771 (1992) of 13 August 1992, the Council defined ethnic cleansing as a "violation of international humanitarian law".[155] In Resolution 819 (1993) of 16 April 1993, the Council, more precisely

> "5. *Reaffirms* that any taking or acquisition of territory by threat or use of force, including through the practice of 'ethnic cleansing', is unlawful and unacceptable;
>
> 6. *Condemns and rejects* the deliberate actions of the Bosnian Serb party to force the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of the Republic of Bosnia and Herzegovina as part of its overall abhorrent campaign of 'ethnic cleansing';
>
> 7. *Reaffirms* its condemnation of all violations of international humanitarian law, in particular the practice of 'ethnic cleansing' and *reaffirms* that those who commit or order the commission of such acts shall be held individually responsible in respect of such acts".[156]

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[148] En 683 in the original: "Cf. the U.S. Court of Appeals, 2nd Circuit, in *Siderman de Blake v. Argentina*, (1992) *I.L.R.*, vol. 103, p. 455, at p. 471; the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait*, (1996) *I.L.R.*, vol. 107, p. 536 at pp. 540-541; the United Kingdom House of Lords in *R. v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827, at pp. 841, 881. Cf. the U.S. Court of Appeals, 2nd Circuit in *Filartiga v. Pena-Irala*, (1980), 630 F.2d 876, *I.L.R.*, vol. 77, p. 169, at pp. 177-179."

[149] En 684 in the original: "*Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996*, p. 226, at p. 257, para. 79."

[150] ILC Articles, Article 40, *Application of this chapter*, commentary, para. (5).

[151] *Ibid.*, commentary, paras. (5)-(6).

[152] *Ibid.*, commentary, para. (8).

[153] See above, para. 7.

[154] See above, note 52.

[155] S/RES/771(1992), *Former Yugoslavia*, 13 August 1992, paras. 2 and 3.

[156] S/RES/819(1993), *Bosnia and Herzegovina*, 16 April 1993.

97. Similarly, in its Resolution 46/242 of 25 August 1992, the General Assembly

> "6. *Condemns* the violation of the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina as well as the massive violations of human rights and international humanitarian law, in particular the abhorrent practice of 'ethnic cleansing', and demands that this practice be brought to an end immediately and that further steps be taken, on an urgent basis, to stop the massive and forcible displacement of population from and within the Republic of Bosnia and Herzegovina, as well as all other forms of violation of human rights in the former Yugoslavia;
>
> ...
>
> 8. *Calls upon* all States and international organizations not to recognize the consequences of the acquisition of territory by force and of the abhorrent practice of 'ethnic cleansing.'"[157]

98. Though culminating in genocidal effect, such crimes could, in this case, still be classified as ethnic cleansing if the goal behind the destruction was not the extermination of the group but rather their forcible removal from the given territory. Under such circumstances, ethnic cleansing and genocide come close to bleeding together; it nonetheless remains that ethnic cleansing cannot be classified as genocide if the intent behind the removal of the population is not total destruction. Such a conclusion was drawn by the International Court of Justice in its 2007 Judgment concerning *Application of the Convention on the Prevention and Prosecution of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*:

> "Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is to destroy, in whole or in part a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. [...] As the ICTY has observed, while there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing' (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet [a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide. (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) [...] In fact, in the context of the Convention, the term 'ethnic cleansing' has no legal significance of its own..."[158]

99. It remains that "ethnic cleansing" both by its method (use of force, intimidation of civil populations)[159] and its result (change in the ethnic composition of the population living on the territory) is incompatible with peremptory norms of public international law whether one considers that "[t]hose practices constitute crimes against humanity and can be assimilated to specific war crimes [or] could also fall within the meaning of the Genocide Convention."[160] Whether it is assimilated to genocide – a position which I personally do not share – or to a crime against humanity,

[157] A/RES/46/242, *The situation in Bosnia and Herzegovina*, 25 August 1992.

[158] ICJ, *Application of the Convention on the Prevention and Prosecution of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, prec. note 120, p. 123, para. 190. See also, quoting this passage: ECHR, Judgment, 12 July 2007, *Jorgic v. Germany*, Application no. 74613/01, para. 45.

[159] "As a practice, ethnic cleansing could mean a set of different actions, directly or indirectly related to military operations, committed by one group against members of other ethnic groups living in the same territory." (D.Petrović, "Ethnic Cleansing – An Attempt at Methodology", *EJIL*, Vol. 5 (1994), p. 344, referring to the Special Rapporteur on the situation of human rights in the territory of former Yugoslavia: A/47/666-S/24809, Human Rights Situations and Reports of the Special Rapporteurs and Representatives, Situation of human rights in the territory of former Yugoslavia, Annex, *Report on the situation of human rights in the territory of the former Yugoslavia prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 15 of the Commission resolution 1992/S-1/1 and Economic and Social Council decision 1992/305*, 17 November 1992, p. 6, paras. 9-10; and E/CN.4/1993/50, Commission on Human Rights, Forty-ninth session, Agenda, Item 27, *Report on the situation of human rights in the territory of the former Yugoslavia prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 15 of the Commission resolution 1992/S-1/1 and Economic and Social Council decision 1992/305*, 10 February 1993 of the Commission for Human Rights, Tadeusz Mazowiecki, third and fourth Reports on See also: S/1994/674, *Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780(992)*, 27 May 1994, p. 33, para. 130.

[160] *Ibid.*, para. 129.

or seen as an autonomous crime, I would think that the prohibition of ethnic cleansing is a peremptory of general international law.

100. In spite of the non-existence of a generally accepted definition, I deem it quite clear that the Azerbaijanis in Nagorno-Karabakh and the surrounding districts were victims of an ethnic cleansing:

- while the Azerbaijani population constituted around 25 per cent of the population of the Nagorno-Karabakh area before the war,[161] and constituted the almost exclusive population of the surrounding territories,[162] the Armenian population is now usually estimated around 95 per cent of the total population of this area;[163]
- the situation is indisputably the result of Armenian or Armenia's controlled forces; and
- there seems to be wide evidence of brutalities which were the origin of the situation.[164]

101. I am conscious that for their parts, the Armenians and their supporters[165] allege that the cleansing of the region under Armenian control of virtually all its Azerbaijani population is an answer to acts of the same nature committed by the Azerbaijani Party during the war in Nagorno-Karabakh. I do not take any position on the existence and qualification of such acts: in any case, an act of ethnic cleansing can be no excuse for committing an act of the same nature by way of reprisal or retaliation. As the International Court of Justice very clearly noted: "...in no case could one breach of the [Genocide] Convention serve as an excuse for another"[166]. Moreover, as Article 26 of the 2011 ILC Articles on the Responsibility of States firmly establishes that no circumstance can preclude "the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law", and, as I have just noted, if there were only one norm of this kind, it would undoubtedly be the prohibition of genocide.

(iii) Consequences of Armenia's serious breaches

102. When the criterions of Article 40 are met, this entails specific consequences that are dealt with in Article 41 of the ILC Articles, *Particular consequences of a serious breach of an obligation under this chapter*, which provides that:

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
>
> 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law."

103. It is said in the commentary that that paragraph does not precise "what form this cooperation should take", nor "what measures States should take in order to bring an end to serious breaches".[167]

104. An example of situation to which the obligation of collective non-recognition of Article 41, paragraph 2, applies is the "territorial acquisitions brought about by the use of force".[168] The ILC recalls the fact that this principle is affirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.[169]

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[161] See above, note 52.
[162] International Crisis Group, "Nagorno-Karabakh: Viewing the Conflict from the Ground", prec. note 6, p. 7.
[163] Estimation available at: http://www.nkrusa.org/country_profile/overview.shtml. See also ECHR, *Chiragov and Others v. Armenia*, prec. note 5, para. 27 and *Sargsyan v. Azerbaijan*, prec. note 23, para. 25.
[164] See above, para.7.
[165] See the clearly one-sided study by Caroline Cox and John Eibner, "Ethnic Cleansing in Progress: War in Nagorno-Karabakh", *Sumgait.info* (available at: http://sumgait.info/caroline-cox/ethnic-cleansing-in-progress/post-soviet-conflict. htm).
[166] ICJ, Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, ICJ Reports* 1997, p. 258, para. 35.
[167] ILC Articles, Article 41, *Particular consequences of a serious breach of an obligation under this chapter*, commentary, paras. (2)-(3).
[168] *Ibid.*, commentary, para. (6).
[169] *Ibid.*

105. The second obligation under paragraph 2 is the prohibition to render aid or assistance in maintaining the situation, which "deals with the conduct 'after the fact' which assists the responsible State in maintaining a situation 'opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law'"[170], [171]

106. Finally, paragraph 3 means that a serious breach "entails the legal consequences stipulated for all breaches"[172] and "allow for such further consequences of a serious breach as may be provided by for by international law".[173]

107. The characterization of serious breaches in relation with the occupation would entail these consequences for all the States, along with the "classic" consequences of any internationally wrongful act.[174]

(c) Attribution to Armenia

108. As provided for by Article 2(b) of the ILC Articles a breach of international law entails the responsibility of a State when it "is attributable to the State under international law".[175] Chapter II of the first part of the Articles deals with the complex issue of attribution of a conduct to a State and provides with different hypotheses of attribution. Of course, there is no – or little – problem when the breach – whether an act or an omission – is constituted by the conduct of an organ of the State concerned or persons or entities exercising elements of governmental authority.[176] This first hypothesis does not call for long developments: it is obvious that Armenia's responsibility is entailed when its own organs – in particular Armenian military – are the author of a violation of international law,[177] including of the law of belligerent occupation.

109. The question of Armenia's responsibility for the conduct of other entities is far more complex. The main relevant provision in the ILC Articles in this respect is Article 8 on "Conduct directed or controlled by a State":

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

The central question in this respect in the present case is whether the conduct of the Armenians of Nagorno-Karabakh and the surrounding districts can be attributed to Armenia and entail its responsibility.

110. The rule contained in Article 8 has been the subject of abundant case-law and doctrinal propositions.

111. As is well known, the International Court of Justice interpreted this rule as implying an "effective control of the State concerned" in the *Military and Paramilitary* case.

> "115. The Court has taken the view (...) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself (...) for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. (...) For this conduct to give

[170] Fn 698 in the original: "*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971*, p. 16, at p. 56, para. 126."

[171] ILC Articles, Article 41, *Particular consequences of a serious breach of an obligation under this chapter*, commentary, para. (11).

[172] *Ibid.*, para. (13).

[173] *Ibid.*, para. (14).

[174] See above para. 86.

[175] See above, para. 85.

[176] See Articles 4 ("Conduct of organs of a State") and 5 ("Conduct of persons or entities exercising elements of governmental authority").

[177] See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, prec. note 69, p. 242, para. 213.

rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[178]

112. Such an interpretation has been confirmed by the International Court of Justice in the *Bosnian Genocide* case[179] in which the Court firmly maintained its position against that, less rigid, adopted by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) which contented itself with an "overall control".[180]

113. The undersigned faces a problem in this respect: I have always considered the "*Nicaragua* test" too rigid –[181] and particularly so when applied to serious breaches of obligations arising under peremptory norms where, in any case, an overall control should suffice. If this is so, there is no doubt that the conditions of that test ("the *Tadić* test") are met.[182] If the *Nicaragua* test applies, I am not in a position to assess its relevance in the various unlawful operations performed by the "NKR" and the Armenians of Nagorno-Karabakh and an inquiry to that end would be far beyond the reach of the present Legal Opinion.

114. This being said, two further remarks are in order:

- First, as aptly noted by late Sir Ian Brownlie, "[a] State cannot avoid legal responsibility for its illegal acts of invasion, of military occupation, and for subsequent developments, by setting up, or permitting the creation of, forms of local administration, however these are designated".[183]; and,
- Second, although there are uncertainties as to the conditions for applying the concept of complicity in international law, I have but little doubt that it could apply in the present circumstances.[184]

(d) The implementation of Armenia's responsibility

115. Part III of the ILC Articles is devoted to "The implementation of the international responsibility of a State". It starts with a Chapter concerning "Invocation of the responsibility of a State".[185] Besides, various provisions relating to the notice of claims, which would be of relevance if Azerbaijan would be prepared to introduce law suits directly against Armenia – which is in any case not the subject-matter of the present Legal Opinion, Article 48 must be signalled in that it admits that the responsibility of a State may in certain circumstances be invoked by a State other than an injured State.

116. This is so in particular if "the obligation breached is owed to the international community as a whole."[186] In such a case,

> "Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

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178 ICJ, *Military and Paramilitary Activities in and Against Nicaragua*, prec. note 55, pp. 64-65, para. 115.

179 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, prec. note 120, p. 209, para. 403.

180 Case IT-94-1, *Prosecutor v. Tadić*, (1999) *I.L.M.*, vol. 38, p. 1546, para. 145.

181 See e.g. CR 2006/8 (translation), Public sitting, 3 March 2006, Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (A.Pellet), pp. 26-27, paras. 66-67.

182 See above, para. 112.

183 I.Brownlie, *State Responsibility: The Problem of Delegation*, in *Völkerrecht zwischen normativen Anspruch und politischer Realität - Festschrift Zemanek*, Berlin, 1994, p. 301.

184 See e.g.: Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, 26 February 1999 (OAS/Ser.L/V/II.102, doc. 9, Rev. 1, 26 Feb. 1999, paras. 258-262). In the literature, see e.g.: J.Quigley, "Complicity in International Law: A New Direction in the Law of State Responsibility", *B.Yb.I.L.*, vol. 57 (1986), p. 77; J.E.Noyes & B.D.Smith, "State Responsibility and the Principle of Joint and Several Liability", *Yale Journal of International Law*, vol. 13 (1988), p. 225; B.Graefrath, "Complicity in the Law of International Responsibility", *Revue belge de droit international*, vol. 29 (1996), p. 370.

185 Articles 42 to 48.

186 Article 48(1)(b).

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached."[187]

If related to Article 41,[188] this provision can be of interest in that Azerbaijan could base itself on this provision to request the cooperation of other States required under Article 41.

Chapter II of Part III bears upon "Countermeasures".[189] The core principle is posed by Article 49 (1) according to which:

"1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two."

Article 50 for its part lists the "Obligations not affected by countermeasures" and can be summarized as excluding any measures affecting obligations arising from peremptory norms, in particular those prohibiting the use of force or protecting fundamental human rights.

117. In principle, counter-measures are reserved to the injured State – in other terms: within the limits provided for by the ILC Articles, they can be used by Azerbaijan in its relations with Armenia and they are of no direct relevance for the present Opinion. However, attention can be drawn on the rather enigmatic Article 54 on "Measures taken by States other than an injured State":

"This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."

118. From my point of view, this Part of the present Opinion offers a general description of the common legal and factual background which must be kept in mind when answering the four questions which have been asked to me and to which I now turn.

II. LEGAL CONSEQUENCES OF THE INVOLVEMENT OF STATES AND NATURAL AND LEGAL PERSONS

119. The first question concerns the legal consequences arising from the direct or indirect involvement of third States, as well as natural and legal persons within their jurisdiction in the activities listed at paragraph 1 of the present Report.

120. First and foremost, I have to recall here that States are under an obligation not to recognize a situation of unlawful occupation, and not to aid or assist the responsible State in maintaining that situation inasmuch as serious breaches of obligations arising under peremptory norms of general international law are concerned.[190] Consequently, any activity considered as contributing to the maintenance of a situation constituting a serious violation of such a norm would entail the responsibility of the State either as the wrongdoer or for aiding or assisting the author of the wrongful act[191] with the consequences and obligations flowing from any internationally wrongful act as developed in Part I of this Report.

121. The present Part is divided into two sections. Section 1 describes the legal framework applying to the various categories of activities listed at paragraph 1 of the present Report and the specific conditions in which States and private persons, whether natural or legal persons, can entail their responsibility. Section 2 focuses on the means offered to the Republic of Azerbaijan to ensure the implementation of the responsibility of the concerned actors.

[187] Article 48 (2); see also Article 54 ("Measures taken by a State other than the injured State"), below, para. 117.
[188] See above, para. 102.
[189] Articles 49 to 54.
[190] See above, Part I, paras. 88-93.
[191] See above, e.g., Part I, paras. 102-107.

Section 1. Legal Framework Governing the Activities Carried out in the Occupied Territories of Azerbaijan

122. The activities listed by the Government of the Republic of Azerbaijan can be classified into six distinct categories:

- Establishment of settlements (A.)
- Activities concerning the exploitation and trade of Azerbaijani natural resources (B.)
- Other economic and financial activities (C.)
- Changes in the infrastructures and exploitation of the telecommunication network (D.)
- Alteration of the cultural character and heritage of the occupied territories (E.)
- Promotion of the occupied territories as a touristic destination, organisation of illegal visits and other activities (F.)

123. For each of these categories, I will first draw the legal framework in light of both general and, where appropriate, specific rules of international law and then wonder whether and to what extent breaches are attributable to Armenia.

124. Concerning the facts and evidences of involvement of States, natural and legal persons in these activities, I will essentially rely on the Report of March 2016 prepared by the Ministry of Foreign Affairs of the Republic of Azerbaijan on Illegal Economic and Other Activities in the Occupied Territories of Azerbaijan" (hereinafter "the MFA Report").[192]

A. Establishment of Settlements

1. Applicable law

125. As mentioned in the first Part of the present Report,[193] situations of military occupation, which is the case for Nagorno-Karabakh and the other surrounding districts, are dealt with especially in The Hague Regulations of 1907, the Fourth Geneva Convention of 1949 and the First Additional Protocol of 1977.

126. Article 49 of the Fourth Geneva Convention – the text of which is reproduced in full in paragraph 63 above – firmly prohibits the establishment of settlements and transfers of population.

127. Furthermore, it results from Article 85(4)(a) of the first 1977 Protocol that "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention" shall be considered as a grave breach of that Protocol "when committed wilfully and in violation of the Conventions or the Protocol".[194]

128. The rule prohibiting the transfer of population is of customary nature according to the ICRC Study on customary international humanitarian law. Rule 129 of this authoritative document provides that:

> "A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.
>
> B Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of civilians involved or imperative military reasons demand".[195]

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[192] Report by the Ministry of Foreign Affairs of the Republic of Azerbaijan, "Illegal Economic and Other Activities in the Occupied Territories of Azerbaijan", March 2016, available at: http://www.mfa.gov.az/files/file/MFA_Report_on_the_occupied_territories_March_2016_1.pdf. See also A/70/1016-S/2016/711, *Annex to the Letter dated 15 August 2016 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General*, 16 August 2016.

[193] See paras. 47-50.

[194] Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 85 para. 4 (a).

[195] J.-M.Henckaerts and L.Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: Rules, ICRC, Cambridge, Reprinted with corrections in 2009, p. 457, Rule 129. This study is a compilation of unwritten rules governing the conduct of the parties to an armed conflict that are part of customary international law.

129. Rule 130 of the same study provides that: "States may not deport or transfer parts of their own civilian population into a territory they occupy". It can already be noted that these customary rules impose obligations binding only States, not private persons.[196]

130. In its *Wall* Advisory Opinion, the International Court of Justice considered the establishment of settlements by Israel in the Occupied Palestinian Territory and mentioned in Article 49, paragraph 6, of the Fourth Geneva Convention, and stated that that provision "prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory".[197] The Court concluded that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law".[198]

131. The Israeli's establishment of settlements in the occupied territories had previously been condemned by the Security Council in relation with the prolonged occupation of the West Bank by Israel. In its first significant resolution on Israeli settlements, concerning "Territories occupied by Israel" (of 1979), the Council

> "1. *Determines* that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East."[199]

132. This first resolution was followed by many others.[200] After having determined that the establishment of settlement had no legal validity, the Security Council called upon "the Government and people of Israel to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem".[201] In another resolution on the territories occupied by Israel, the Security Council reaffirmed "that the acquisition of territory by force is inadmissible".[202]

133. Similarly, the General Assembly recalled "relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities".[203]

134. In its *Wall* Advisory Opinion of 2004, the International Court of Justice noted that there was a risk related to "the departure of Palestinian populations from certain areas"[204] and considered that the construction of the wall, "coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory".[205]

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[196] For more developments on this, see *infra*, paras. 202-203.

[197] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, prec. note 29, p. 183, para. 120.

[198] *Ibid.*, p. 184, para. 120.

[199] S/RES/446(1979), *Territories occupied by Israel*, 22 March 1979, para. 1.

[200] See e.g.: S/RES/465(1980), *Territories occupied by Israel*, 1 March 1980; S/RES/476(1980), *Territories occupied by Israel*, 30 June 1980; S/RES/478(1980), *Territories occupied by Israel*, 20 August 1980; S/RES/497(1981), *Israel-Syrian Arab Republic*, 17 December 1981; S/RES/904(1994), *Measures to guarantee the safety and protection of the Palestinian civilians in the territories occupied by Israel*, 18 March 1994; S/RES/1397(2002), *The Middle East, including the Palestinian question*, 12 March 2002; S/RES/1515(2003), *Middle East including the Palestinian question*, 19 November 2003.

[201] S/RES/452(1979), *Territories occupied by Israel*, 20 July 1979, para. 2.

[202] S/RES/476(1980), *Territories occupied by Israel*, 20 June 1980, preamble, para. 2.

[203] A/RES/ES-10/7, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, 11 November 2000, para. 6. See also, e.g.: A/RES/ES-10/14, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, 12 December 2003, para. 13; A/RES/58/292, *Status of the Occupied Palestinian Territory, including East Jerusalem*, 17 May 2004; A/RES/60/41, *Jerusalem*, 10 February 2006; A/RES/ES-10/16, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, 4 April 2007; A/RES/70/89, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, 15 December 2015, para. 1.

[204] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, prec. note 29, p. 184, para. 122.

[205] *Ibid.*, p. 191, para. 133.

135. The establishment of settlements is, in itself, clearly in breach of peremptory norms of international law, in particular the principles of territorial integrity of States and of non-acquisition of territories by force.[206] This is also true for the measures tending to alter the demographic composition of occupied territories. After its first resolutions on the Israeli settlements, the Security Council became more specific about the reasons for their wrongfulness. In 1980, it determined

> "that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East".[207]

It also considered

> "that all such measures which have altered the geographic, demographic and historical character and status of the Holy City of Jerusalem are null and void and must be rescinded in compliance with the relevant resolutions of the Security Council."[208]

136. It clearly results from the 2004 International Court of Justice Advisory Opinion, as well as from the resolutions mentioned above that the changes in the demographic composition of occupied territories are contrary to international law and condemned as such by the international community.

2. Breaches attributable to Armenia

137. Various sources show that the Azerbaijani population of the occupied territories started to flee or was expelled from the areas concerned after the beginning of the war.[209] As noted by the European Court of Human Rights in *Chiragov*,

> "According to the USSR census of 1989, the NKAO had a population of around 189,000 consisting of 77% ethnic Armenians and 22% ethnic Azeris, with Russian and Kurdish minorities."[210],

while

> "[e]stimates of today's population of Nagorno-Karabakh vary between 120,000 and 145,000 people, 95% being of Armenian ethnicity. Virtually no Azerbaijanis remain."[211]

138. The forced departure of the Azerbaijani population was clearly a consequence of the actions of the Armenian forces or their affiliates in the territory of the Republic of Azerbaijan.

139. In all the resolutions it adopted on the Nagorno-Karabakh conflict, the Security Council expressed its concern about the civilians displaced in different other areas of the Azerbaijani territory. In the first resolution, the Security Council expressed "grave concern at the displacement of a large number of civilians and the humanitarian emergency in the region, in particular in the Kelbajar district".[212] It then expressed concern about "the displacement

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[206] See Part I, para. 25.

[207] S/RES/465(1980), *Territories occupied by Israel*, 1 March 1980, para. 5. See also, e.g.: S/RES/476(1980), *Territories occupied by Israel*, 30 June 1980; S/RES/478(1980), *Territories occupied by Israel*, 20 August 1980; S/RES/904(1994), *Measures to guarantee the safety and protection of the Palestinian civilians in the territories occupied by Israel*, 18 March 1994; S/RES/1397(2002), *The Middle East, including the Palestinian question*, 12 March 2002; S/RES/1515(2003), *Territories occupied by Israel*, 19 November 2003; S/RES/1544(2004), *Middle East, including the Palestinian question*, 19 May 2004.

[208] S/RES/476(1980), *Territories occupied by Israel*, 30 June 1980, para. 5.

[209] Human Rights Watch, *Seven Years of Conflict in Nagorno-Karabakh*, prec. note 11, p. xii; also quoted in ECHR, *Chiragov and Others*, prec. note 5, paras. 22-25; "The Azeri Civilian Population Was Expelled from All Areas Captured by Karabakh Armenian Forces"; T. De Waal, *op. cit.*, pp. 216, 218.

[210] ECHR, *Chiragov and Others v. Armenia*, *ibid.*, para. 13; or *Sargsyan v. Azerbaijan*, prec. note 23, para. 15.

[211] *Ibid.*, respectively para. 27 and para. 24.

[212] S/RES/822(1993), prec. note 13, preamble, para. 6.

of a large number of civilians in the Azerbaijani Republic"[213] and finally deplored "the latest displacement of a large number of civilians and the humanitarian emergency in the Zangelan district and the city of Goradiz and on Azerbaijan's southern frontier".[214]

140. In its resolution 48/114 of 23 March 1994, entitled "Emergency international assistance to refugees and displaced persons in Azerbaijan", the Assembly expressed grave concern about the continuing deterioration of the humanitarian situation in Azerbaijan owing to the displacement of large numbers of civilians and noted with alarm "that the number of refugees and displaced persons in Azerbaijan has recently exceeded one million".[215]

141. The link between the displacement of civilians and the hostilities has been clearly established by the Representative of the Secretary-General, Mr. Francis M. Deng, who stated that "[i]nternal displacement in Azerbaijan is a direct consequence of the conflict over the territory of Nagorno-Karabakh".[216]

142. In its Report on the Nagorno-Karabakh conflict, the International Crisis Group stressed that in the occupied territories, "[b]efore the war, 424,900 inhabitants of those districts were almost exclusively Azeris,[217] none of whom remain. Towns like Agdam (28,200), Kelbajar (8,100), Jebrail (6,200) and Fizuli (23,000)[218] have been systematically levelled so that only foundations remain."[219] Thus, the armed forces of the "NKR", along with Armenia, are at least partly, liable for the diminution of the ethnic Azerbaijani population in the occupied territories of Azerbaijan. All the documents cited above show that the displacement of Azerbaijani civilians did not only happen in Nagorno-Karabakh but rather concerns all of the occupied territories of the Republic of Azerbaijan.

143. In a Report of 2005, the OSCE Fact-Finding Mission (FFM) to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh "found three categories of Armenians from Armenia in [these] territories"[220] and "observed disparate settlement incentives traceable to the authorities within and between the various territories".[221] According to its mandate, the mission had to "visit the occupied territories surrounding Nagorno-Karabakh (the 'territories') and determine whether settlements exist in the area".[222] The FFM visited six districts and estimated "approximately 1,500 settlers in the areas visited, based on interviews and direct observation".[223]

144. It results from the above that the establishment of settlements is clearly a breach of international law and that the actions purporting to change the demographic composition of the occupied territories of the Republic of Azerbaijan are contrary to the treaty provisions in force between Armenia and Azerbaijan and to customary rules of international law applied in the resolutions and decisions mentioned above. This is an absolute prohibition which does not tolerate any exception. The involvement, directly or indirectly of States, natural and legal persons in such activities in the occupied territories of Azerbaijan entails the legal consequences explained in section 2 below.

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[213] See S/RES/853(1993), prec. note 14, preambl. para. 6 and S/RES/874(1993), prec. note 167, preambl. para. 7.
[214] S/RES/884(1993), prec. note 19, preambl. para. 8.
[215] A/RES/48/114, operative para. 2.
[216] E/CN.4/1999/79/Add.1, Commission on Human Rights, Fifty-fifth Session *Report of the Representative of the Representative of Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human resolution 1998/50*, Addendum, Profiles in displacement: Azerbaijan, 25 January 1999, paras. 20, 30.
[217] Fn 74 in the original: "According to the 1989 census, Azeris were 96 per cent in Kelbajar, 89.9 per cent in Lachin, 99.6 per cent in Jebrail, 99.4 per cent in Kubatly, 99.2 per cent in Fizuli and 99.5 per cent in Agdam. Armenians were registered in Zangelan (0.4 per cent), and in Kubatly, Fizuli and Agdam (all 0.1 per cent). *Ethnic Composition of the Population of Azerbaijani SSR*, *op. cit.*, pp. 7-8."
[218] Fn 75 in the original: "'The Population of Azerbaijani Republic, 1989', Statistical Collection, Baku, 1991, pp. 11-13."
[219] International Crisis Group, "Nagorno-Karabakh: Viewing the conflict from the ground", prec. note 6, p. 7.
[220] A/59/747-S/2005/187, *Letter dated 18 March 2005 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, Annex II, Report of the OSCE Fact-Finding Mission (FFM) to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh (NK)*, 21 March 2005, p. 34.
[221] *Ibid.*, p. 35.
[222] *Ibid.*, p. 8.
[223] *Ibid.*, p. 11.

B. Activities Concerning the Exploitation and Trade of Azerbaijani Natural Resources

1. Applicable Law

145. The activities involving the natural resources of the occupied territories of Azerbaijan under the control of Armenia (exploitation and trade of natural resources and other forms of wealth, cutting of rare species of trees, timber exporting, exploitation of water etc.) fall under the scope of the legal principle of permanent sovereignty over natural resources, especially in relation with occupation.

146. The principle of permanent sovereignty over natural resources finds its source in several resolutions adopted by the United Nations General Assembly.[224] In its Resolution 1803 (XVII) of 14 December 1962, entitled "Permanent Sovereignty over Natural Resources", the General Assembly declared that:

> "1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
>
> 2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes should be in conformity with the rules and conditions which peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities".

The principle was then included in Article 1, paragraph 2, of the Covenants of 1966, which provides that:

> "2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

147. It results from the General Assembly resolutions that the principle of permanent sovereignty over natural resources was intended to apply to situations in which peoples are either former colonial territories or under other forms of foreign occupation, which are deemed to be similar and call for the application of the same rules.[225]

148. On this basis, the General Assembly adopted a number of resolutions on the permanent sovereignty over national resources in the occupied Arab territories. This is the case of Resolution 3336 (XXIX) of 17 December 1974 on the Permanent sovereignty over national resources in the occupied Arab territories which

> "1. *Reaffirms* the right of the Arab States and peoples whose territories are under Israeli occupation to full and effective permanent sovereignty over all their resources and wealth;
>
> 2. *Also reaffirms* that all measures undertaken by Israel to exploit the human, natural and all other resources and wealth of the occupied Arab territories are illegal, and calls upon Israel immediately to rescind all such measures;
>
> 3. *Further reaffirms* the right of the Arab States, territories and peoples subjected to Israeli aggression and occupation to the restitution of and full compensation for the exploitation, depletion and loss of, and damages to, the natural and all other resources and wealth of those States, territories and peoples;
>
> 4. *Declares* that the above principles apply to all States, territories and peoples under foreign occupation, colonial rule, alien domination and *apartheid*, or subjected to foreign aggression".[226]

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[224] See, e.g., A/RES/626(VII), *Right to Exploit Freely Natural Wealth and Resources*, 12 December 1952; A/RES/1803(XVII), *Permanent Sovereignty over Natural Resources*, 14 December 1962; A/RES/3016(XXVII), *Permanent Sovereignty over Natural Resources of Developing Countries*, 18 December 1972.

[225] See P.Daillier, M.Forteau and A.Pellet, *Droit international public*, *op. cit.* note 48, p. 1157.

[226] Several similar resolutions have been adopted by the General Assembly. See, e.g.: A/RES/3516(XXX), *Permanent sovereignty over national resources in the occupied Arab territories*, 15 December 1975; A/RES/38, *Permanent sovereignty over national resources in the occupied Arab territories*, 19 December 1983.

149. The situation in the occupied territories in Azerbaijan can be compared in several respects to that prevailing in Namibia during the 1970s concerning which the United Nations Council for Namibia adopted the famous Decree No. 1 for the Protection of the Natural Resources of Namibia[227] in which it decreed that:

> 1. No person or entity, whether a body corporate or unincorporated, may search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export, or distribute any natural resource, whether animal or mineral, situated or found to be situated within the territorial limits of Namibia without the consent and permission of the United Nations Council for Namibia or any person authorized to act on its behalf for the purpose of giving such permission or such consent;
>
> 2. Any permission, concession or licence for all or any of the purposes specified in paragraph 1 above whensoever granted by any person or entity, including any body purporting to act under the authority of the Government of the Republic of South Africa or the "Administration of South Africa" or their predecessors, is null, void and of no force or effect;
>
> 3. No animal resource, mineral, or other natural resource produced in or emanating from the Territory of Namibia may be taken from the said Territory by any means whatsoever to any place, whatsoever outside the territorial limits of Namibia by any person or body, whether corporate or unincorporated, without the consent and permission of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council;
>
> 4. Any animal mineral or other natural resource produced in or emanating from the Territory of Namibia which shall be taken from the said Territory without the consent and written authority of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council may be seized and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;
>
> 5. Any vehicle, ship or container found to be carrying animal, mineral or other natural resources produced in or emanating from the Territory of Namibia shall also be subject to seizure and forfeiture by or on behalf of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;
>
> 6. Any person, entity or corporation which contravenes the present decree in respect of Namibia may be held liable in damages by the future Government of an independent Namibia;
>
> 7. For the purposes of the preceding paragraphs 1, 2, 3, 4 and 5 and in order to give effect to this decree, the United Nations Council for Namibia hereby authorizes the United Nations Commissioner for Namibia, in accordance with resolution 2248 (S-V), to take the necessary steps after consultations with the President.

This model only applies to Namibia. It can nevertheless give some sense of measures which can be taken by the United Nations in such circumstances.

150. There can be but little doubt that the principle of permanent sovereignty over natural resources applies in the situations of military occupation. As long as the exploitation and trade of resources and wealth are not done in the benefit of the concerned populations, it is contrary to the principle of permanent sovereignty over natural resources.

2. Breaches by Armenia

151. It is said, in the MFA Report, which is "based on the collection and analysis of information from various public sources, predominantly Armenian ones",[228] that "farmlands in the occupied territories [...] have been illegally appropriated and extensively exploited by Armenia, its companies and the subordinate separatist regime, which grant free concessions to the settlers to exploit those territories"[229] and that "[t]he development of agriculture in the

[227] General Assembly, Official Records: Thirty-fifth session, Supplement No. 24 (A/35/24), *Report of the United Nations Council for Namibia*, Vol. I, Annex II, p. 153.

[228] MFA Report, p. 7.

[229] *Ibid.*, p. 55.

occupied territories is used not only for economic, but also for demographic reasons".[230] The Report also indicates that some products harvested in the occupied territories "are transported to Armenia for domestic consumption and possibly for re-export."[231]

152. The MFA Report also indicates that there is a systematic pillage of the occupied territories multiple resources and stresses that "[i]f such looting was previously conducted by the individual Armenian settlers and soldiers, this practice is currently replaced with more organized system of pillage, under the direction and control of Armenia".[232]

153. Armenia's behaviour towards the natural resources of the occupied territories constitutes a breach of international law, especially of Azerbaijan's permanent sovereignty over its national resources.

C. Economic and Financial Activities

154. In addition to the previous mentioned activities, linked to the exploitation of Azerbaijani natural resources, many activities listed by the Government of the Republic of Azerbaijan concern the economic and financial fields, like the establishment of enterprises, the conduct or businesses in or with entities in the occupied territories, the provision of banking services etc. I deem it unfeasible to discuss them one by one and have grouped them under a single category concerning "Economic and financial activities".

1. Applicable law

155. Absent express mentions of an obligation for States to refrain from economic activities in occupied territories in treaty law,[233] such an obligation is rooted in customary international law. It can be inferred from the principle according to which every State "has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources *and economic activities*".[234]

156. The obligation to refrain from such activities in occupied territories arguably flows from the general duty of non-recognition of armed conquest, highlighted by the International Court of Justice in its *Namibia* Advisory Opinion:

> "124. The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory".[235]

157. However, this obligation is not absolute and must not be implemented blindly:

> "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international Co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."[236]

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[230] *Ibid.*, p. 58.
[231] *Ibid.*, p. 67.
[232] *Ibid.*, p. 68.
[233] See E.Kontorovich, "Economic Dealings with Occupied Territories", *Columbia Journal of Transnational Law*, Vol. 53, No. 3, 2015, p. 591.
[234] See A/RES/3281(XXX), *Charter of Economic Rights and Duties of States*, 12 December 1974, Annex, Chapter II, Art. 2 – italics added.
[235] ICJ, Advisory Opinion, 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports* 1971, pp. 55-56, para. 54.
[236] *Ibid.*, p. 56, para. 125. See also, in the same line: S/2002/161, *Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council*, 12 February 2002; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, prec. note 69, p. 253, para. 250.

158. As noted by James Crawford in a Legal Opinion prepared for the Trade Unions Congress on 24 January 2012,

> "[n]otably, the occupier does not administer the occupied territory as a trustee for the population. International law seeks to strike a balance between the interests of the occupying power and the interests of the occupied population. However, an occupant may not exploit the economy of the territory in order to benefit its own economy. 'In no case can it exploit the inhabitants, the resources, or other assets of the territory under its control for the benefit of its own territory or population.'[237] It could be argued that the settlements are *per se* in breach of this principle, given that the assets of the West Bank in the settlement areas are being utilized entirely for the benefit of Israel. Moreover, the character of occupation as a temporary measure indicates that an occupier lacks the authority to make permanent changes to the occupied territory. It seems likely that this includes the construction of infrastructure related to the settlements (such as roads or light rail systems, not to mention settlement buildings) that would outlast any change in the status of the territory."[238]

159. This is consistent with the conclusion that Articles 40 and 41 of the ILC Articles apply to the situation of the occupied territories of the Republic of Azerbaijan.[239]

2. Breaches by Armenia

160. The MFA Report gives Armenian statistics on the number of entities involved in the trade of goods unlawfully produced in the occupied territories and also on the top destinations for export. More importantly, it is stated in the Report that the Government of Armenia "is supporting and encouraging production and export of the products unlawfully produced in the occupied territories"[240] and that "[t]he relevant State agencies of Armenia provide logistical support to Armenian and foreign enterprises operating in the occupied territories to export their products to international markets and organize trips for foreign businessmen to those territories to explore investment opportunities there".[241]

161. The MFA Report also indicates that Armenia is economically and financially taking advantage from the armed occupation, highlighting the fact that "[t]he examined evidence reveals that the exploitation of mineral and other economic wealth in the occupied territories is turned into a lucrative business and is the major sources of income for Armenia and its subordinate separatist regime".[242]

162. As indicated above, economic activities are closely linked to the principle of permanent sovereignty over natural resources. In that way, Armenia's involvement in the way detailed in the MFA Report is, at the very least, a breach of Azerbaijan's sovereignty over its resources.

D. Changes in Infrastructures and Exploitation of the Telecommunication Network

1. Applicable law

163. The law applicable to "permanent economic, social and transport infrastructure changes" largely overlaps with the rules to be applied to economic and financial activities.[243] In a nutshell: the occupying power cannot modify or suppress the existing infrastructure but no rule prohibits, in case of prolonged occupation, that it performs works of maintenance or construction of infrastructure (roads, telecommunications) in the interest of the population of the occupied territory.

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[237] Fn 108 in the original: "Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in E.Playfair, (ed.) *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press: Oxford, 1992), 420-1."

[238] J.Crawford SC, Opinion for the Trades Union Congress, *Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories*, 2012 (https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf), para. 61.

[239] See above, Part I, paras. 85-90.

[240] MFA Report, p. 51.

[241] *Ibid.*

[242] *Ibid.*, p. 77.

[243] See paras. 155-159, above.

164. This is but an illustration of the general rule laid down in Article 43 of The Hague Regulations (THR):

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

165. As explained in Part I above,[244] it results from this Article that the occupying power does not have a general or broad authority to exercise government powers, but rather has limited competences that can be exercised only in order to "restore, and ensure, as far as possible, public order and safety".[245]

166. Based on these principles, the project of a canal linking the Mediterranean Sea to the Dead Sea was condemned by the General Assembly, which especially considered that:

> "the canal linking the Mediterranean Sea with the Dead Sea, if constructed, is a violation of the rules and principles of international law, especially those relating to the fundamental rights and duties of States and to belligerent occupation of land".[246]

The General Assembly also called upon

> "all States, specialized agencies and governmental and non-governmental organizations not to assist, directly or indirectly, in the preparation and execution of this project, and strongly urge[d] national, international and multinational corporations to do likewise".[247]

167. The same considerations hold true concerning the exploitation of Azerbaijan's fixed and cellular radio-telecommunication networks and radio frequencies in the occupied territories, being noted that Article 64, paragraph 4, of the Fourth Geneva Convention expressly provides that:

> "The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and *likewise of the establishments and lines of communication used by them*."[248]

168. Concerning these activities, the documents of the International Telecommunication Union (hereinafter "ITU"), of which both Armenia and Azerbaijan are members since 30 June 1992 and 10 April 1992 respectively[249], are also of interest. First, the Preamble of the Constitution of the ITU fully recognizes "the sovereign right of each State to regulate its telecommunication".[250] Second, Article 33 of the Convention provides that:

> "Members recognize the right of the public to correspond by means of the international service of public correspondence. The services, the charges and the safeguards shall be the same for all users in each category of correspondence without any priority or preference".[251]

and Article 39 provides that:

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[244] Paras. 59-60 above.

[245] See also para. 157 and note 236 and ICRC, Expert Meeting, "Occupation and Other Forms of Administration of Foreign territory", Report prepared and edited by Tristan Ferraro, March 2012, available at https://www.icrc.org/eng/assets/files/ publications/icrc-002-4094.pdf.

[246] A/RES/39/101, *Israel's decision to build a canal linking the Mediterranean Sea to the Dead Sea*, 14 December 1984, para. 2.

[247] *Ibid.*, para. 4.

[248] Italics added.

[249] Information available at: https://www.itu.int/online/mm/scripts/mm.list?_search=ITUstates&_languageid=1.

[250] Constitution and Convention of the International Telecommunication Union, 22 December 1992 Published in Final Acts of the Additional Plenipotentiary Conference of Geneva, 1992, Preamble.

[251] *Ibid.*, Article 33, *The Right of the Public to Use the International Telecommunication Service*.

> "In order to facilitate the application of the provisions of Article 6 of this Constitution, Members undertake to inform one another of infringements of the provisions of this Constitution, the Convention and of the Administrative Regulations".

169. An illustration of the limits to the powers of the occupants stemming from these provisions is furnished by a resolution of the Assembly of the Plenipotentiary Conference of the ITU, held in Nicaragua in 1989, condemning various practices of Israel in the Occupied Arab Territories.[252] In this resolution, the Plenipotentiary Conference declared itself concerned

> "by the fact that the Israeli occupation authorities deliberately and repeatedly interrupt the means of telecommunication within the Palestinian and other occupied Arab territories, in breach of the principles of Articles 18 and 25 of the International Telecommunication Convention (Nairobi, 1982)",[253]

these Articles corresponding to the Articles cited above. The Conference irrevocably condemned "the deliberate isolation by Israel of the occupied Palestinian and other Arab territories from the outside world and the restriction of free transmission of information".[254]

170. In 1997, the World Radio-communication Conference adopted a resolution in which it resolved "that, unless specifically stipulated otherwise by special arrangements communicated to the Union by administrations, any notification of a frequency assignment to a station shall be made by the administration of the country on whose territory the station is located".[255] It then belongs to the Azerbaijani authorities to change frequency assignments and to notify these changes to the ITU. However, no ITU resolution condemns the mere exploitation of frequencies by an occupying power – which indeed would be to the detriment of the population.

171. But it results from the above that an exploitation that would benefit only to a certain population of the occupied territories would not be in conformity with the rules of the ITU. In that case only, the exploiting States would entail its responsibility under general international law and for the violation of these provisions. In the special circumstances of the present case, I deem it obvious that it is likely that the exploitation of resources and changes being made by Armenia in the occupied territories can serve to the benefit of the Armenians residing in those territories. However, such measures are not rendered legal since they violate the sovereignty of Azerbaijan and are detrimental to the rights of the Azerbaijani population expelled from those territories as a result of Armenian aggression.

2. Breaches by Armenia

172. Concerning the infrastructure changes, the MFA Report provides with multiple examples, especially "permanent energy, agriculture, social, residential and transport infrastructure in the occupied territories".[256] It is stated that "[b]uilding infrastructure in the occupied territories is linked directly to support of the maintenance and existence of settlements and to bring and keep more Armenian settlers in those territories."[257] This statement is corroborated with facts, especially since evidence showed that "[t]ransport infrastructure projects carried out in the occupied territories include in particular a network of roads designed exclusively for connecting Armenia and the occupied territories and Armenian settlements within the occupied territories."[258]

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[252] Plenipotentiary Conference, Resolution No. 64, *Condemnation of the Practices of Israel in the Occupied Arab Territories*, 1989, Published in Final Acts of the Plenipotentiary Conference of Nice, 1989, p. 338.

[253] *Ibid.*, p. 339. Articles 18 and 25 corresponded, at the time to Articles 33 and 39 cited above at para. 168. The ITU Constitution and Convention were modified in 1992 at the Additional Plenipotentiary Conference of the ITU held in Geneva.

[254] *Ibid.*, p. 340.

[255] World Radiocommunication Conference, *Notification of frequency assignments*, 1997, published in Final Acts of the World Radiocommunication Conference of Geneva, 1997, p. 405.

[256] MFA Report, p. 37.

[257] *Ibid.*, p. 38.

[258] *Ibid.*

173. As for the exploitation of Azerbaijan's fixed and cellular radio-telecommunication networks and radio frequencies, the MFA Report indicates that Armenia "assigns its unique numbering code +374 to the occupied territories, exploits Azerbaijan's fixed and cellular radio-telecommunication networks and radio frequencies."[259]

E. Alteration of the Cultural Character and Heritage of the Occupied Territories

174. The activities in the occupied territories listed at paragraph 1 of the present Report include archaeological excavations, embezzlement of artefacts and altering of cultural character of the occupied territories. Given the situation of military occupation and the subsequent application of international humanitarian law, the rules governing the protection of the cultural heritage must be mainly searched in the law concerning military occupation.

1. Applicable law

175. The Hague Regulations of 1907 contain provisions on cultural property. In the Section 2 (on hostilities), article 27, paragraph 1, provides that:

> "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes."

176. Provisions concerning cultural property can also be found in the section dedicated to military authority over the territory of hostile State. Article 47 provides that pillage "is formally forbidden", which indeed applies to cultural heritage. Article 56 of The Hague Regulations provides with more specific rules in this respect and reads as follows:

> "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

177. These activities are also dealt with in the 1977 Protocol Additional I to the Geneva Conventions of 12 August 1949, of which Article 53 provides that:

> "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
>
> (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
> (b) to use such objects in support of the military effort;
> (c) to make such objects the object of reprisals."

178. Finally, the protection of cultural heritage during armed conflict is the object of a specific convention adopted under the auspices of the UNESCO: the Convention for the Protection of Cultural Property in the Event of Armed Conflict adopted on 14 May 1954, to which the Republic of Azerbaijan and the Republic of Armenia are parties.[260]

179. The definition of cultural property in the Convention is wide, since its first article defines it as, irrespective of origin or ownership,

> "(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other

[259] *Ibid.*, p. 24.

[260] The list of the State Parties to the Convention is available at: http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha.

objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'."

180. The provisions of Article 5 specifically apply to the situations of military occupation:

"1. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.

2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation.

3. Any High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Convention dealing with respect for cultural property."

181. The Convention was opened to signature together with an additional Protocol, to which both Armenia and Azerbaijan are parties.[261] The Parties to the Protocol especially undertake "to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May, 1954".[262]

182. The Convention was completed by a second Protocol, adopted on 26 March 1999, to which both Armenia and Azerbaijan are also parties.[263] Chapter 4 of this Protocol deals with criminal responsibility and jurisdiction. It provides with a wide range of obligations for States to make sure that the authors of criminal acts against cultural property do not remain unpunished.

183. The prohibition of the illicit export of cultural property from occupied territory is considered to be a customary rule. Rule 41 of the ICRC Study on customary international humanitarian law provides that the occupying power "must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory".[264]

184. Furthermore, the UNESCO adopted a resolution on archaeological excavations in which it is stated that:

"32. In the event of armed conflict, any Member State occupying the territory of another State should refrain from carrying out archaeological excavations in the occupied territory. In the event of chance finds being made, particularly during military works, the occupying Power should take all possible measures to protect these finds, which should be handed over, on the termination of hostilities, to the competent authorities of the territory previously occupied, together with all documentation relating thereto."[265]

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[261] The list of the State Parties to the first Protocol is available at: http://www.unesco.org/eri/la/convention.asp?KO=15391&language=E&order=alpha.

[262] Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, Section I, para. 1.

[263] The list of the States Parties to the second Protocol is available at: http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha.

[264] J.-M.Henckaerts and L.Doswald-Beck (eds), *Customary International Humanitarian Law*, Volume I: Rules, ICRC, Cambridge, 2005, p. 135, Rule 41.

[265] Recommendation on International Principles Applicable to Archaeological Excavations, 5 December 1956, Records of the General Conference, Ninth Session, p. 44, para. 32.

185. In 1981, the General Assembly of the United Nations adopted a resolution concerning archaeological excavations in eastern Jerusalem in which it determined that "the excavations and transformations of the landscape and of the historical, cultural and religious sites of Jerusalem constitute a flagrant violation of the principles of international law and the relevant provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949".[266]

186. The activities concerning the cultural property and heritage in the occupied territories of Azerbaijan are governed by all the above-mentioned rules.

2. Armenia's breaches

187. The MFA Report indicates that "Armenia continues to interfere in the cultural environment of the occupied territories by taking measures aimed at altering their historical and cultural features."[267] Evidence showed that cultural and religious monuments, sometimes many centuries old "have been destroyed, burnt and pillaged"[268] and that under alleged reconstruction and development reasons, archaeological excavations in the occupied territories "are carried out with the sole purpose of removing any signs of their Azerbaijani cultural and historical roots and substantiating the policy of territorial expansionism."[269]

188. The MFA Report also indicates that "[a]nalysis of the period of more than 20 years since the establishment of a ceasefire in 1994 demonstrates that armed hostilities have not destroyed Azerbaijani monuments to the extent to which this has been subsequently done by the Armenian side."[270] This shows that these activities are deliberately conducted and that the many destructions to be deplored are not a direct consequence of any military necessity, which undoubtedly makes them illicit.

F. Promotion of the Occupied Territories as a Touristic Destination, Organisation of Illegal Visits and Other Activities

189. Armenia and Azerbaijan are both members of the World Tourism Organization (hereinafter "the UNWTO"),[271] respectively since 1997 and 2001.[272] Article 3, paragraph 1, of the UNWTO Statutes provides that:

> "The fundamental aim of the Organization shall be the promotion and development of tourism with a view to contributing to economic development, international understanding, peace, prosperity, and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The Organization shall take all appropriate action to attain this objective."

190. In October 1999, the UNWTO members adopted a Global Code of Ethics for Tourism as a non-legally binding instrument.[273] Article 6 of this Code deals with the "Obligations of stakeholders in tourism development". Its first paragraph provides that

> "1. Tourism professionals have an obligation to provide tourists with objective and honest information on their places of destination and on the conditions of travel, hospitality and stays; they should ensure that the contractual clauses proposed to their customers are readily understandable as to the nature, price and quality of the services they commit themselves to providing and the financial compensation payable by them in the event of a unilateral breach of contract on their part".

Article 6, paragraph 5, for its part, provides that

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[266] A/RES/36/15, *Recent developments in connection with excavations in eastern Jerusalem*, 28 October 1981, para. 1. See also, e.g., UNESCO, World Heritage Committee, 38th Session, 15-25 June 2014 (Doha, Qatar), Decision 38 COM 7A.4, paras. 4 and 17.

[267] MFA Report, p. 85.

[268] *Ibid.*, para. 86.

[269] *Ibid.*

[270] *Ibid.*, p. 88.

[271] When drafting this Opinion, the undersigned was the (external) Legal Adviser of the UNWTO; by no means can what he writes in this Section be interpreted as representing the views of the Organisation.

[272] Information available at http://www2.unwto.org/fr/members/states.

[273] See A/RES/406(XIII), 13th WTO General Assembly, Santiago, Chile, 27 September - 1 October 1999.

> "5. Governments have the right – and the duty – especially in a crisis, to inform their nationals of the difficult circumstances, or even the dangers they may encounter during their travels abroad; it is their responsibility however to issue such information without prejudicing in an unjustified or exaggerated manner the tourism industry of the host countries and the interests of their own operators; the contents of travel advisories should therefore be discussed beforehand with the authorities of the host countries and the professionals concerned; recommendations formulated should be strictly proportionate to the gravity of the situations encountered and confined to the geographical areas where the insecurity has arisen; such advisories should be qualified or cancelled as soon as a return to normality permits."

191. In May 2015, the Executive Council of the UNWTO adopted a decision based on a proposal made by the Government of Azerbaijan. In this decision, the Organization urged

> "governments, as well as public and private stakeholders in the tourism sector, to observe and respect the Global Code of Ethics for Tourism as well as all ethical principles embodied in the United Nations General Assembly and Security Council resolutions, in all circumstances, including during armed conflicts".[274]

This also is a non-binding recommendation.

2. Armenia's breaches

192. The MFA Report indicates that "Armenia facilitates and organises visits to foreign countries by the agents of the subordinate regime by issuing them Armenian passports, including diplomatic ones"[275] and that these visits "only serve to propagate the unlawful separatist regime."[276] It is also stated that "Armenia continues to exploit tourism as a tool for its annexation policies. In particular, tourism is being abused by Armenia to propagate the illegal separatist entity and generate financial means to consolidate the results of the occupation."[277]

Section 2. Implementation of the Responsibility for the Activities in the Occupied Territories

193. This Report is not directly concerned with the responsibility of Armenia itself for its breaches of its international obligations as an occupying power or for the conduct of its controlled affiliate in Nagorno-Karabakh. Anyway, the general mechanism of State responsibility as described in Section C of Part I of the present Report applies both to the responsibility of Armenia on the one hand and of third States which are involved, directly or indirectly, by action or inaction, in the illegal activities of Armenia in the occupied territories of Azerbaijan (A.). Clear cut answers are more difficult in respect to the legal consequences of the involvement of natural and legal persons in those same activities (B.).

A. Responsibility of Third States Involved in the Illegal Activities of Armenia in the Occupied Territories

194. The legal consequences arising for third States involved in the illegal activities of Armenia in the occupied Azerbaijani occupied territories may derive from two different sources:

- the general law of international responsibility of States as described in the 2001 ILC Articles; and
- sanctions taken by the United Nations or other international organisations (mainly – if not exclusively – the EU) or by individual States.

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[274] CE/DEC/22(C), *Recommendations of the World Committee on Tourism Ethics on the proposal of the Government of the Republic of Azerbaijan: "Prevention of Promotion of Conflict Zones as Tourism Destinations and Using Tourism for Illegal Purposes"*, EC decision 1 (XCIX) and the proposed draft resolution of the Government of Azerbaijan, Agenda item 11 (document CE/100/11), 27-29 May 2015, para. 2.

[275] MFA Report, p. 88.

[276] *Ibid.*

[277] *Ibid.*

1. The general rules of international responsibility

195. I have described in Part I of the present Opinion the system of State responsibility.[278] It results from these rules that Armenia is responsible for its own internationally wrongful acts as well as for those of its lieges in the occupied parts of Azerbaijan. I have also explained that third States had particular responsibilities inasmuch as the violations of its obligations by Armenia could be considered as serious breaches of obligations arising under peremptory norms of international law.[279]

196. It is appropriate to make two supplementary remarks in this respect:

(1) Only such breaches impose specific duties to third States. For other kinds of breaches, the system of international responsibility remains a State-to-State mechanism exclusively concerning the wrongdoer and the State victim of the wrongful act. This being said, as I have shown, several conducts attributable to Armenia qualify as "serious breaches".

(2) One of the main characters of public international law is that even its binding rules, including peremptory rules, are mandatory but not enforceable. This trait entails very important consequences concerning the courses of action open to Azerbaijan as well against Armenia itself as against third States for the violations of their "derivative obligations".[280]

197. In international law, judges are available – notably the International Court of Justice which has a general competence for all legal disputes arising between States – but on the strict basis of mutual consent of the States concerned.[281] Since Azerbaijan has not made the optional declaration accepting the jurisdiction of the Court under Article 36, paragraph 2, of the Statute, it could seize the Court as well against Armenia itself[282] as against third States only on the basis of either a Special Agreement (*Compromis*) or the compromissory clause of a more general treaty.

2. Possible sanctions and consequences for third States

198. At the margin of the law of responsibility, sanctions, whether emanating from international organisations or from individual States, are a means which can be used in order to limit the consequences of gross violations of international law.

199. In the commentary of the first draft of its Articles on State Responsibility, the ILC endorsed the limited definition of sanctions as being institutional and made allowance

> "for the trend in modern international law to reserve the term 'sanction' for reactive measures applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community as a whole, and in particular for certain measures which

[278] Paras. 85-93 above.

[279] Paras. 88 *et seq.* above.

[280] See above, Part I, paras 99-102.

[281] There are many instances in which the ICJ decided that it could not go further because of the non-acceptance of its jurisdiction by the opposing party: ICJ, Order, 12 July 1954, *Case of the treatment in Hungary of aircraft of United States of America (United States of America v. Union of Soviet Socialist Republics), ICJ Reports* 1954, p. 103; ICJ, Order, 14 March 1956, *Aerial incident of March 10th 1953 (United States of America v. Czechoslovakia), ICJ Reports* 1956, p. 6; ICJ, Order, 16 March 1986, *Antarctica case (United Kingdom v. Argentina), ICJ Reports* 1956, p. 12; ICJ, Order, 14 March 1956, *Aerial incident of October 7th 1952 (United States of America v. Union of Soviet Socialist Republics), ICJ Reports* 1956, p. 9; ICJ, Order, 9 December 1958, *Case concerning the Aerial Incident of September 4th 1954 (United States of America v. Union of Soviet Socialist Republics), ICJ Reports* 1958, p. 158; ICJ, Order, 7 October 1959, *Case concerning the Aerial Incident of 7 November 1954 (United States of America v. Union of Soviet Socialist Republics), ICJ Reports* 1959, p. 276. The consent to the jurisdiction is needed even when the alleged violations concern *erga omnes* or peremptory norms of general international law: ICJ, Judgment, 30 June 1995, *East Timor (Portugal v. Australia), ICJ Reports* 1995, p. 102, para. 29; ICJ, Judgment, 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, ICJ Reports* 2006, p. 52, para. 125.

[282] Armenia for its part has not made the optional declaration under Article 36(2).

the United Nations is empowered to adopt, under the system established by the Charter, with a view to the maintenance of international peace and security."[283]

200. Since some Armenia's wrongful acts are serious breaches of obligations deriving from peremptory norms of general international law, all States are concerned and may "take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached" as (ambiguously) recognized by Article 54 of the 2001 ILC Articles.[284]

B. Responsibility of Natural and Legal Persons Involved

201. Illegal activities within or in relation with the occupied territories of Azerbaijan may also give rise to civil or criminal responsibility of private persons, although it highly depends on the applicable domestic law of the State concerned.

1. Civil responsibility of private persons

202. Most of the general rules of international law are binding on States only and do not directly create obligations for natural or legal persons, the consequence being that, as a matter of principle, States bear the responsibility for the violations of international norms resulting from the conduct of private persons. However, this does not mean that international provisions or decisions can in no way be binding for natural and legal persons.

203. As the Permanent Court of International Justice put it, "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption of some definite rules creating individual rights and obligations and enforceable by national courts".[285] The same applies to some customary rules.

204. However, while international norms can have a direct or vertical effect and directly address natural and/or legal persons, the general rule is that they effectively only apply through the States concerned (most usually the territorial State). In other words, it belongs to States to enforce rules of international law and to ensure that they are respected by private persons.

205. This essential characteristic of public international law has two main consequences:

- *First*, regardless of the capacity of individuals to be bound by international legal norms, it is undisputed that States have a duty of vigilance which obliges them to ensure that their nationals do not transgress rules of international law,[286] and *a fortiori* peremptory norms; if they do not discharge this obligation, they entail their international responsibility; we are then brought back to the hypothesis discussed in Sub-Section A above;
- *Second*, if private persons do not comply with their obligations under international law, generally speaking, only domestic courts and tribunals, which are the ordinary bodies capable of sanctioning breaches of international law, could be competent.

206. However, the effectiveness of their intervention depends on the national rules of the States concerned, and also on the one hand on the intention of the authors of the norm, and on their degree of clarity on the other hand.[287] These criteria may be appreciated differently according to the country where judicial proceedings can be instituted.

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[283] *ILC Yearbook* 1979, vol II, Part 2, p. 121 – commentary of draft article 30, para. 21.

[284] See Part I, para. 115 above.

[285] P.C.I.J. Advisory Opinion, 3 March 1928, *Jurisdiction of the Courts of Danzig (Pecuniary claims of Danzig railway officials who have passed into the Polish service, against the Polish Railway Administration)*, Collection of Advisory Opinions, Series B., No. 15, pp. 17-18.

[286] See e.g. ICJ, Judgment, 24 May 1980, *United States Diplomatic and Consular Staff in Tehran, ICJ Reports* 1980, p. 32, paras. 66-67.

[287] I do not have in mind here the general evolution of international law which tends to increasingly recognize an international legal personality to private persons particularly in the fields of human rights and the law of investment (see K.Parlett, *The Individual in the International Legal System*, Cambridge UP, 2011, 462 p.; R.Jennings and A.Watts eds., *Oppenheim's International Law*, 9th ed., Vol. 1, *Peace*, Longman, Londres, 1992, pp. 846-849; P.Daillier, M.Forteau and A.Pellet, *Droit international public*, *op. cit.* note 48, pp. 768-773). I focus on more directly applicable rules or principles which could be of interest in view to reacting to Armenia's breaches of international law.

207. Even if States have the primary responsibility to ensure the respect of international law, private persons can be liable for their behaviours under international law. First, soft law instruments state general principles directly addressed to them; second, their responsibility is entailed when they breach lawful sanctions decided either by a State or an international organisation.

208. In the first place, I recall the existence of various instruments providing for the application of international rules to natural and legal persons. Thus, according to the Norms on the responsibilities of transnational corporations adopted in 2003 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, these entities and other business enterprises, their officers and persons working for them are "obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments such as (…) the International Covenant on Civil and Political Rights; (…) the four Geneva Conventions of 12 August 1949 and two Additional Protocols thereto for the protection of victims of war (…) and other instruments."[288] These norms are neither the first nor an isolated attempt of the international community to make transnational corporations and business enterprises aware of their responsibilities.[289]

209. Such documents are not legally binding: they are mere recommendations formulated by international organisations, the respect of which depends on the will of the corporations and enterprises concerned. However, despite the absence of legally binding effects, they do reflect a widespread *opinio juris* and like similar instruments, can contribute to the elaboration of legally binding norms and be used, in the meantime as additional argument in support of a case based on "harder law".[290]

210. This is the case when a State or an international organisation adopts sanctions against a State responsible for serious breaches of obligations deriving from peremptory norms of general international law, which imposes direct obligations on individuals or other private persons. In such cases, national courts are less reluctant to examine the alleged responsibility of the natural or legal person involved than when they are asked to base themselves on the general law of international responsibility.

2. The implausible hypothesis: international criminal responsibilities

211. Article 8 of the Rome Statute contains a rule similar to the one contained in Article 49 of the Fourth Geneva Convention. In effect, Article 8, paragraph 2 (b) (viii), provides that "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" constitutes a war crime over which the International Criminal Court (hereinafter "the ICC") has jurisdiction.

212. However, Armenia and Azerbaijan are not Parties to this instrument and there are very few chances that the ICC gets to work on the Nagorno-Karabakh conflict. In effect, Article 12 of the Rome Statute reads as follows:

> "1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
>
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crime is a national.

[288] E/CN.4/Sub.2/2003/12/Rev.2, Economic, social and cultural rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, 24 August 2003, Preamble, para. 4.

[289] See, for example, OECD, *Guidelines for Multinational Enterprises*, DAFFE/IME/WPG(2000)15/FINAL, 31 October 2001 (http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=daffe/ime/wpg(2000)15/final). See, in general: P.Daillier, M.Forteau and A.Pellet, *Droit international public*, *op. cit.* note 48, pp. 425-427.

[290] See *ibid.* For the Norms adopted by the Sub-Commission of Human Rights, see I.Bantekas, "Corporate Social Responsibility in International Law", *Boston University International Law Journal*, vol. 22, 2005, pp. 309-347.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

213. Article 13, for its part, provides that:

"The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."

214. If the authors of the establishment of settlements in the occupied territories of the Republic of Azerbaijan are not nationals of a Member State of the ICC, the only way the Court could have jurisdiction would be the referring of the situation to its Prosecutor, by the Security Council.

III. MEASURES THAT MIGHT BE TAKEN BY STATES

215. This section deals with questions 3 and 4, which relate to measures that might be taken by States towards natural and legal persons, whether they are under their jurisdiction (A) or they intend to enter their territories (B).

A. Measures that might be taken by States against natural and legal persons within their jurisdiction

216. I am asked to describe concrete measures that might be taken by foreign States to institute legal proceedings against natural and legal persons within their jurisdiction which are involved in or profiteering from the economic and other illicit activities in the occupied territories of Azerbaijan.

217. As noted in the MFA Report, several States are involved in or profiteering from the activities dealt with in the previous section.[291] It would be beyond the scope of this Legal Opinion to focus on specific activities, companies or individuals; the present Part will then suggest measures in a general way. However, all the measures described hereinafter could apply indistinctively to any State involved.

218. The institution of legal proceedings against natural and legal persons within the jurisdiction of a State is essentially a matter of domestic law which can nonetheless be, in specific contexts, rendered compulsory or, at least, be highly influenced by international law at least as far as criminal prosecutions are concerned. Domestic law applies more exclusively in civil law matters.

[291] See e.g.: MFA Report, p. 29.

1. Possible criminal proceedings

219. In the present case, absent specific sanctions adopted by the States concerned, they could – and should – nevertheless take penal action against the wrongdoers on two different grounds: the 1949 Red Cross Geneva Conventions on the one hand and the 1954 Hague Convention on the protection of cultural property during armed conflicts.

(a) Institution of legal proceedings on the basis of the Geneva Conventions

220. The 1949 Geneva Conventions contain provisions concerning the penal sanctions that the States Parties must take against the persons who are responsible of certain breaches of the Conventions. The Fourth Convention relating to the Protection of Civilian Persons in Time of War on which a good part of the present Report is based includes a part on penal sanctions.

221. Article 146 of this Convention provides for the obligations of the State Parties concerning the taking of penal sanctions. It reads as follows:

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.
>
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.
>
> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949."

222. For its part, Article 147 of the Fourth Geneva Convention defines grave breaches as follows:

> "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

223. If some of the acts listed in Article 147 of the Fourth Geneva Convention are committed against protected persons or property protected by the Convention, the States Parties shall be under an obligation to search for the alleged authors of such acts and to bring them before their courts regardless of their nationality.

224. Some of the activities occurring in the occupied territories fall under the scope of the grave breaches listed in Article 147.

225. First of all, the activities concerning the establishment and development of settlements in the occupied territories of the Republic of Azerbaijan are grave breaches of the Convention. The contrariety of such activities to international law, in particular to Article 49 of the Fourth Geneva Convention and customary international law, has been detailed in the previous Part of the Report.[291] Article 147 provides that the "unlawful deportation or transfer or unlawful

[291] See paras. 125 *et seq.* above.

confinement of a protected person" is a grave breach of the Convention. The term "deportation" refers to Article 49, which is entitled "Deportations, transfers, evacuations" and is the only Article of the Convention containing the word "deportation" in its title. The first paragraph of this Article prohibits "[i]ndividual or mass forcible transfers" carried out by the occupying power, and gives the "deportations of protected persons from occupied territory to the territory of the Occupying Power or that of any other country, occupied or not" as an example of such forcible transfers.

226. Therefore, the States Parties to the Geneva Conventions on the territory of which natural and legal persons who are alleged authors of unlawful deportation or transfer of civilians can be found are under an obligation to bring such persons before their jurisdiction or to hand them over to another Contracting Party which has made out a *prima facie* case against them.

227. The same reasoning can also be made with respect to some of the activities related to the cultural property of the occupied territories of the Republic of Azerbaijan. In effect, the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is also a grave breach of the Fourth Geneva Convention according to Article 147. No distinction seems to be made between private and public property and the very important appropriation and destructions, in particular of cultural property in the occupied territories of Azerbaijan are well-documented.[293]

228. The ICRC commentary of the Fourth Geneva Convention discusses Article 147 in the following terms:

> "(a) Destruction. – The Fourth Convention forbids the destruction of civilian hospitals and their property or damage to ambulances or medical aircraft. Furthermore, the Occupying Power may not destroy in occupied territory (Article 53) real or personal property except where such destruction is rendered absolutely necessary by military operations. On the other hand, the destruction of property on enemy territory is not covered by the provision. In other words, if an air force bombs factories in an enemy country, such destruction is not covered either by Article 53 or by Article 147. On the other hand, if the enemy Power occupies the territory where the factories are situated, it may not destroy them unless military operations make it absolutely necessary."[294]
>
> "(b) Appropriation. – To appropriate property, the enemy country must have it in its power by being in occupation of the territory where it is situated. It will be recalled, in this connection, that the requisitioning of civilian hospitals and their material and the requisitioning of foodstuffs is subject in occupied territory to a series of restrictive conditions. To constitute a grave breach, such destruction and appropriation must be extensive: an isolated incident would not be enough !. Most national penal codes punish the unlawful destruction and appropriation of property. In the same way, most military penal codes punish pillage. However, it will be noted that the destruction and appropriation mentioned here are dependent on the necessities of war. Therefore, even if in the national codes there are definitions of what constitutes such necessities, it seems difficult to apply this idea without adaptation to an army or even to a State. It seems, therefore, that the appropriation and destruction mentioned in this Convention must be treated as a special offence."[295]

229. In addition to these provisions, Article 85 of the First Additional Protocol to the Geneva Conventions completes the list of grave breaches:

> "4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
>
> (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
> [...]

[293] See e.g., paras. 187 *et seq.* above.

[294] J.S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary*, vol. IV, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, 1956, p. 601.

[295] *Ibid.*

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes."

230. This Article underlines the importance of the prohibitions of unlawful deportations and appropriation and destruction of property.

231. According to the ILC's Final Report on the obligation to extradite or prosecute (hereinafter "the ILC Final Report"),[296] basing itself on the typology addressed in the opinion of Judge Yusuf in the *Belgium v. Senegal* case,[297] the Geneva Conventions, as well as other instruments not relevant for the present case, are part of a category of Conventions containing "clauses which impose an obligation to submit to prosecution, with extradition becoming an obligation if the State fails to do so".[298]

232. Another possible ground could be the European Convention on Extradition of 13 December 1957 concluded between the Member States of the Council of Europe, which includes all the EU Members as well as Armenia and Azerbaijan.[299] Article 1 of the Convention provides that:

"The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for carrying out a sentence or detention order."

Article 2 deals with the extraditable offences and its first paragraph provides that:

"Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months."

233. Recourse to the European Convention is however of limited interest since:

- Article 4 excludes the extradition of military offences from the application of the Convention, which, in the present case, excludes – or, at least, considerably limits – the relevance of this ground. But the ground offered by the Fourth Geneva Convention is solid and self-sufficient; and
- Article 6, paragraph 1 (a), provides that: "A Contracting Party shall have the right to refuse extradition of its nationals."

234. The ILC Final Report provides with a complete and persuasive analysis of the scope of the obligation to extradite or prosecute. Concerning the implementation of this obligation, it results from the Final Report that the obligation "applies only to facts having occurred after the entry into force of said treaty for the State concerned."[300] When a

[296] Final Report of the International Law Commission, *The obligation to extradite or prosecute (*aut dedere aut judicare*)*, A/69/10, *Report on the wok of the sixty-sixth session (2014)*, Chapter VI, pp. 139-165.

[297] ICJ, Judgment, 20 July 2012, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *ICJ Reports* 2012, p. 422, Separate Opinion of Judge Yusuf, pp. 567-568, paras. 19-22.

[298] ILC, Final Report, p. 6.

[299] Both Armenia and Azerbaijan are States Parties to that instrument. The Convention entered into force for Armenia on 25 April 2002 and for Azerbaijan on 26 September 2002 (http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/ 024/signatures?p_auth=xxD7IICX).

[300] ILC, Final Report, p. 11.

State has become a party to a treaty providing with such an obligation, it is entitled "to request another State party's compliance with the obligation to extradite or prosecute."[301] Therefore, in the present case, all States which have become Parties to the Fourth Geneva Convention must search for persons involved in or profiteering from the economic and other illicit activities in the occupied territories of Azerbaijan and bring them before their Tribunals or extradite them to another High Party concerned.

235. This, however, is not without some legal difficulties. The most serious one practically speaking, concerns the determination of the "High Parties concerned". In theory it can be sustained that all State Parties are concerned since the breaches bear upon obligations of fundamental importance for the international community of States as a whole. However, in practice, it is most unlikely that States other than Azerbaijan would take the initiative of making a *prima facie* case as required by Article 146 of the Convention.[302] Consequently, a realist approach is that only Azerbaijan could claim the extradition of the private persons concerned – which it can do for the events subsequent to its accession to the Convention on 1st June 1993.[303]

236. As for the consequences of non-compliance with the obligation to extradite or prosecute, in the *Belgium v. Senegal* case, the International Court of Justice decided that it is "a wrongful act engaging the responsibility of the State".[304] The Court also found that the obligation "required Senegal to take all necessary measures for its implementation as soon as possible" and that "[h]aving failed to do so, Senegal has breached and remains in breach of its obligation".[305] Although made with respect to Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, this statement concerns the obligation to extradite or prosecute in general, as recognized by the ILC Final Report's part on the implementation of this obligation.[306]

237. It remains that given that the studies of the ILC do not give any concrete examples, one can think that States have shown reluctance to applying Articles 146 and 147 of the Fourth Geneva Convention.

(b) Institution of legal proceedings on the basis of the 1954 Hague Convention

238. As noted in the previous part of the present Report, The Hague Convention of 1954 and its two additional protocols deal with the protection of cultural property during armed conflicts. Chapter 4 of the Second Additional Protocol to that instrument deals with criminal responsibility and jurisdiction.

239. Article 15 concerns the serious violations of the Protocol:

> "1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
>
> a. Making cultural property under enhanced protection the object of attack;
> b. Using cultural property under enhanced protection or its immediate surroundings in support of military action;

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[301] *Ibid.*

[302] And what would be a "*prima facie*" case is quite uncertain. Nevertheless, this does not seem to be an issue for the ILC, which considers that "[t]he four Geneva Conventions of 1949 contain the same provision whereby each High Contracting Party is obligated to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and to bring such persons, regardless of their nationality, before its own courts. However, it may also, if it prefers, and in accordance with its domestic legislation, hand such persons over for trial to another High Contracting Party concerned, provided that the latter has established a *prima facie* case." Therefore, under that model, the obligation to search for and submit to prosecution an alleged offender is not conditional on any jurisdictional consideration and that obligation exists irrespective of any request of extradition by another party. Nonetheless, extradition is an available option subject to a condition that the prosecuting State has established a *prima facie* case." (*Report of the International Law Commission on the work of its sixty-sixth session*, 5 May - 6 June, and 7 July - 8 August 2014, A/69/10, Chapter VI, pp. 144-145. – footnotes omitted).

[303] According to Article 157, "[t]he situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation." Article 2, paragraph 2, provides that: "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

[304] ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, prec. note 297, p. 456, para. 95.

[305] *Ibid.*, pp. 460-461, para. 117.

[306] See ILC, Final Report, p. 11.

c. Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
d. Making cultural property protected under the Convention and this Protocol the object of attack;
e. Theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act."

240. Article 16 concerns jurisdiction and provides that:

"1. Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:

a. When such an offence is committed in the territory of that State;
b. When the alleged offender is a national of that State;
c. In the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.

2. With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention:

a. This Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law;
b. Except in so far as a State which is not Party to this Protocol may be accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them."

241. Article 17 on the prosecution reads as follows:

"1. The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.

2. Without prejudice to, if applicable, the relevant rules of international law, any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favourable to such person than those provided by international law."

242. It results from these provisions that the States Parties to the Second Additional Protocol are under an obligation to take legislative measures to establish their jurisdiction over the alleged authors of serious violations when such violations are committed in their territory, when the alleged offender is one of their nationals or is present in their territories, depending on the violations allegedly committed.

243. The States Parties to the Protocol which have fulfilled the obligation to take the legislative measures shall extradite or prosecute the alleged authors of acts listed in Article 15, paragraph 1 (a) to (c) – this last sub-paragraph (c) being the most relevant one in the present case. They must establish their jurisdiction over the offences and alleged authors of the acts listed in Article 15, paragraph 1. The States Parties which have not fulfilled these obligations entail their international responsibility for breach of Article 17.

2. Possibilities of civil actions

244. Except in the very unrealistic case of criminal prosecution against criminal organisations,[307] criminal sanctions for the violation of the law of occupation are only provided for against individuals and do not concern commercial or financial corporations, which, however, are clearly more directly concerned when the discussed breaches are at stake. However, international law can play a much more limited role in the opening of a civil action before foreign courts (whether against natural or juridical persons). However, this is not out of question.

245. Notwithstanding the fact that the citizens of Azerbaijan may lodge appeals against the confiscation of their properties and the spoliation of their assets before Armenian courts and tribunals with a good chance to win their case before the European Court of Human Rights if their rights are denied in Armenia, as shown by the *Chiragov* judgment,[308] they could also envisage to act before the courts of third States where are situated the assets of the persons involved in and profiteering from illegal activities in the occupied territories of Azerbaijan.

B. Measures Concerning the Entry of the Separatist Regime's Leaders and Agents on the Territory of Third States

245. The wrongful activities of the leaders of the separatist regime established by Armenia in the occupied territories of Azerbaijan can entail the responsibility of Armenia.

246. However, this section is attached to provide with measures that might be taken by States, not for the involvement of these natural persons' economic and other illegal activities but for the fact that they lead this regime in itself.

247. The separatist regime established by Armenia on a substantial part of the territory of the Republic of Azerbaijan has been acting in violation of Azerbaijan's territorial integrity and sovereignty for years in total impunity. Its leaders and other agents can easily travel because of the provision of passports, including diplomatic ones by Armenia.[309] However, the other States of the international community, especially the ones the leaders of the so-called "NKR" visit, can take measures that could help ending their impunity.

248. The separatist regime is acting in violation of the territorial integrity, independence and sovereignty of the Republic of Azerbaijan. The so-called "NKR" and its leaders are responsible for acts amounting to continuous violations of peremptory norms of international law attributable to Armenia. As explained in some details above,[310] the States of the international community are under obligation to "cooperate to bring to an end through lawful means" such breaches.[311] The taking of such measures against the leaders of the separatist regime is a lawful mean that could bring to an end the multiple violations for which they are responsible. This being said, while there is, under general international law an obligation of conduct to that end, the concrete forms and modalities by which States comply with this obligation to cooperate are left to their appreciation.

249. However, in the circumstances, it can also be noted that, in addition to the economic sanctions or territorial restrictions that can be taken by States or international organizations, measures might be taken on specific grounds of international law. Notably, the obligation *aut dedere aut judicare* can be seen as a ground on which States having the leaders of the separatist regime on their territory could take measures against them. The problem arises in the same terms as in respect to the private persons accused of participating to or profiteering from Armenia's wrongful acts since, in case of grave breaches of the law of the war, including those applying to military occupation, the governmental leaders cannot prevail themselves of their immunities.[312]

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[307] Which is not expressly provided for by the relevant conventions.

[308] Prec. respectively notes 5 and 23.

[309] See paras. 81 and 192 above.

[310] See paras. 102 *et seq.* above.

[311] Cf. Article 41 of the ILC Articles on State Responsibility.

[312] Since the "NKR" is not a State as defined in international law, the question does not arise in their respect. As long as Armenian leaders would be concerned, this is indeed more controversial (see ICJ, Judgment, 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ Reports* 2002, p. 24, para. 58: "The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed

CONCLUSIONS

250. The main findings of the present Opinion can be summarized as follows:

(i) All activities of Armenia and its affiliates in the occupied territories of Azerbaijan listed in para. 1(1) of the present Report are internationally wrongful acts;

(ii) The internationally wrongful acts committed in Nagorno-Karabakh and the other occupied territories of Azerbaijan are attributable to Armenia which is in effective control over these territories and the authorities of the so-called "NKR"; they entail therefore its responsibility whether committed by its own organs or by the secessionist authorities;

(iii) Several among these activities constitute serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*);

(iv) This is notably the case of:

- the use of force in order to impose the *de facto* secession of Nagorno-Karabakh and the other districts of Azerbaijan occupied by Armenia in violation of the Charter of the United Nations;
- the ensuing violation of the sovereignty and territorial integrity of Azerbaijan;
- ethnic cleansing of the Azerbaijani population in the occupied territories of Azerbaijan, including the establishment of settlements and the transfer of populations resulting in the change of the demographic composition of the occupied territories;
- gross violations of the law of belligerent occupation, in particular of Article 43 of the 1907 Hague Regulations and 49 of the 1949 Fourth Geneva Convention;
- the exploitation of natural resources of the occupied territories without consideration for the primacy of the interests of the population (as it existed before the ethnic cleansing of the region); or
- the alteration of the cultural heritage of the region.

(v) These serious breaches can find no circumstances excluding responsibility in the right of peoples to self-determination or self-defence invoked by Armenia;

(vi) They also call for the application of the special consequences resulting from this aggravated responsibility, mainly:

- the non-recognition of the situation created by those serious breaches,
- the prohibition of aid or assistance in maintaining that situation and
- the exclusion of any immunities for the authors of these serious breaches;

(vii) Another consequence of this aggravated responsibility is that all States are entailed to invoke the responsibility of Armenia and,

(viii) although this is more controversial (but, from my point of view, quite certain), to take measures against Armenia "to ensure cessation of the breach and reparation in the interest of [Azerbaijan] or of the beneficiaries of the obligation breached" – that is the natural or legal persons victims of those breaches;

(ix) Therefore, third States could (and should be incited to) exclude goods produced from the benefit of any trade agreement existing or to be concluded in the future;

(x) If such measures are not taken, it would be open to Azerbaijan to challenge any regulation or decision to the contrary before the EU Courts and (but with much more difficulties) before the domestic courts of the States giving equal benefit to goods imported from the Azerbaijani occupied territories and from Armenia;

(xi) The EU Council could freeze the assets of natural or legal persons involved in or profiteering from economic or other illicit activities in the occupied territories of Azerbaijan;

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war crimes or crimes against humanity."). However, I am among those who strongly argue that, when serious violations of obligations resulting from peremptory norms are concerned, the political leaders have no immunities (theory of the "transparency" of the State – see e.g.: A.Pellet, "Can a State Commit a Crime? Definitely, Yes!", *E.J.I.L.*, 1999, vol. 10, n°2, pp. 425-434 or "Le nouveau projet de la C.D.I. sur la responsabilité de l'Etat pour fait internationalement illicite: *Requiem* pour le crime", *in Man's Inhumanity to Man-Festschrift Antonio Cassese*, Kluwer, The Hague, 2002, pp. 654-681; translated in English and updated: "The New Draft Articles of the International Law Commission on the Responsibility of States for International Wrongful Acts: A *Requiem* for States' Crimes?", *Netherlands Yearbook of International Law*, 2001, pp. 55-79).

(xii) The Security Council could also be incited to take measures under Chapter VII in order to put an end to the threat to the peace constituted by the continuing occupation of parts of Azerbaijan;

(xiii) In the (most likely) failure of the Security Council to act, the General Assembly could formally authorize States to take enforcement measures;

(xiv) Measures against the entry of the separatist regime's leaders and agents on the territory of third States are by no means legally impossible;

(xv) Absent sanctions decided by the United Nations, the European Union or individual States, third States are under a legal obligation to sue before their tribunals individuals accused of war crimes and of serious breaches of the law of belligerent occupation or to extradite them;

(xvi) Civil proceedings against these persons before national courts of third States are also possible, although not exempted of difficulties.

Done in Paris on 5 May 2016,

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